SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 178

"S.S. MONROSA", HER ENGINES, TACKLE, ETC., AND NAVIGAZIONE ALTA ITALIA, PETITIONERS,

vs.

CARBON BLACK EXPORT, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 16, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

SUPREME COURT OF THE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16667

CARBON BLACK EXPORT, INC., Appellant,

versus

SS MONROSA, Her Engines, Tackle, Etc., and NAVIGAZIONE ALTA ITALIA, Appellees.

To the Hon. Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana:

JOINT REQUEST FOR PRINTING RECORD—Filed: May 8, 1957

We hereby request that the record on appeal in the above entitled case shall include the following:

1. Libel of Carbon Black Export, Inc.
2. Stipulation to Abide Decree in amount of $100,000.00.
3. Motion to Decline Jurisdiction.
4. Photostat of bill of lading of Creole Line.

[fol. 2] 5. Affidavit of Carl G. Stearns in opposition to Motion to Decline Jurisdiction.

6. Affidavit of E. D. Vickery in Support of Motion to Decline Jurisdiction.

7. Memorandum Opinion of Judge Allen B. Hannay.

8. Agreement Bond in the amount of $100,000.00.

9. Final Decree filed and entered on January 25, 1957.

10. Libelant's Petition for Appeal and Order allowing appeal.

11. Notice of Appeal and Waiver.

12. Assignment of Errors.

Fulbright, Crooker, Freeman, Bates & Jaworski, (Signed) By Carl G. Stearns, Attorneys for Appellant.

Royston & Rayzor, (Signed) By: E. D. Vickery, Attorneys for Appellee.

[fol. 3]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOLDING SESSIONS AT HOUSTON

No. 1417 ADM

CARBON BLACK EXPORT, INC.,

versus

SS "MONROSA", Her Engines, Tackle, Etc. and NAVIGAZIONE ALTA ITALIA

• • • • • • •

[fol. 4] ORIGINAL LIBEL—Filed: April 3, 1956

To the Honorable the Judges of the United States District Court for the Southern District of Texas, Houston Division:

The original libel of Carbon Black Export, Inc.,

-against-

SS MONROSA, her engines, tackle, etc., and Navigazione Alta Italia, in a cause of contract and for loss and damage to cargo, civil and maritime, alleges, upon information and belief, as follows:

First: At all the times hereinafter mentioned, the libelant, Carbon Black Export, Inc., was and now is a corpora-

tion duly organized and existing under the laws of a state of the United States.

[fol. 5] Second: At all the times hereinafter mentioned, the Steamship MONROSA was and now is a general ship employed in the carriage of merchandise by water for hire and now is or will be during the pendency of this suit within this District and within the jurisdiction of this Honorable Court.

Third: At all the times hereinafter mentioned, the respondent, Navigazione Alta Italia, was and now is a corporation organized and existing under the laws of Italy, having its principal office and place of business at Genoa, Italy, and at all times material herein was the owner and operator of the Steamship MONROSA.

Fourth: On or about December 15, 1955, the libelant, Carbon Black Export, Inc., delivered to and shipped on board the Steamship MONROSA, then lying in the Port of Houston, Texas, the following shipments of bags and cartons of carbon black, then being in good order and condition:

[fol. 6]

Bill of Lading No.	*Quantity*	*Consignee*	*Port of Discharge*
1	7 cartons	Maritima S.P.A.	Trieste, Italy
1	1980 bags	Pirelli S.P.A.	Naples, Italy
2	968 bags	Pirelli S.P.A.	Venice, Italy
3	440 bags	Pirelli S.P.A.	Venice, Italy
5	528 bags	Pirelli S.P.A.	Venice, Italy
5	(250 bags ((1 cargon (sic)	Shipper	Genoa, Italy
6	1100 bags	Pirelli S.P.A.	Venice, Italy
7	600 bags	Ditta Ch. Lorilleux & Co.	Venice, Italy
7	25 bags	Ditta G.E. Hess	Genoa, Italy
8	220 bags	Spett Pirelli S.A.	Venice, Italy
9	1544 bags	Pirelli S.P.A.	Venice, Italy
11	4400 bags	Shipper	Venice, Italy
14	10 cartons	Ditta G.E. Hess	Genoa, Italy
17	5 bags	F.I.L.M.S. Fabrica	
	12,060 bags & 18 cartons	Italiana Leghe Metall Iche Sinterizzate	Genoa, Italy

and the said respondent and the said Steamship MONROSA, by and through her agents and her master, then and there accepted such bags and cartons of carbon black so shipped and delivered to said Steamship MONROSA, and in consideration of certain agreed prepaid freight charges, agreed to transport the said bags and cartons of carbon black to the ports of Trieste, Naples, Venice and Genoa, Italy, as hereinabove set forth, and there deliver the same in like good order and condition as when shipped, de-
[fol. 7] livered to and received by said steamship and by the respondent; to the consignees hereinabove set forth, and in accordance with the valid terms of the above described and numbered bills of lading then and there signed and delivered to the libelant by the master and agents of said Steamship MONROSA, the duly authorized agents and representatives of said Steamship MONROSA and of the respondent.

Fifth: On or about December 23, 1955, the libelant, Carbon Black Export, Inc., delivered to and shipped on board the Steamship MONROSA, then lying in the Port of New Orleans, Louisiana, the following shipments of bags of carbon black, then being in good order and condition:

Bill of Lading No.	*Quantity*	*Consignee*	*Port of Discharge*
1	440	Pirelli S.P.A.	Venice, Italy
1	1760	Pirelli S.P.A.	Naples, Italy
2	2640	Pirelli S.P.A.	Venice, Italy
2	308	Pirelli S.P.A.	Naples, Italy
3	2860	Shipper	Naples, Italy
4	880	Pirelli S.P.A.	Venice, Italy
5	300	Ditta F. Fiorentino De Alberto Peretti	Ganoa, Italy
5	1452	Spett Pirelli S.A.	Venice, Italy
6	440	Pirelli S.P.A.	Venice, Italy
7	220	Pirelli S.P.A.	Venice, Italy
8	220	Pirelli S.P.A.	Venice, Italy
9	1320	Pirelli S.P.A.	Venice, Italy
10	4399	Pirelli S.P.A.	Venice, Italy
	17,239		

[fol. 8] and the said respondent and the said Steamship MONROSA, by and through her agents and her master, then and there accepted said bags of carbon black so shipped and delivered to said Steamship MONROSA, and in consideration of certain agreed prepaid freight charges, agreed to transport the said bags of carbon black to the ports of Venice, Naples and Genoa, Italy, as hereinabove set forth, and there deliver the same in like good order and condition as when shipped, delivered to and received by said steamship and by the respondent, to the consignees hereinabove set forth, and in accordance with the valid terms of the above described and numbered bills of lading then and there signed and delivered to the libelant by the master and agents of said Steamship MONROSA, the duly authorized agents and representatives of said Steamship MONROSA and of the respondent.

Sixth: The said Steamship MONROSA sailed from the port of Houston, Texas, on or about December 15, 1955, and sailed from the port of New Orleans, Louisiana, on or about December 23, 1955, having on board the aforesaid shipments of carbon black, and subsequently, and on or about January 20, 1956, arrived at the port of Genoa, Italy, where she discharged and delivered part of said shipments, but not in like good order and condition as when shipped, delivered to and received by her, but on the contrary seriously injured and impaired in value by reason of shortage, slackage, contamination by water and other substances and other damage, and wholly failed to deliver the balance of said shipments at the ports of Genoa, Trieste, Naples, and Venice, Italy, where consigned and destined to, all in violation of the respondent's obligations and duties and of [fol. 9] said vessel's obligations and duties as a carrier of merchandise by water for hire.

Seventh: Libelant was the shipper or owner of the shipments described in this libel, and brings this action on its own behalf and, as agent and trustee, on behalf of and for the interest of all parties who may be or become interested in the said shipments, as their respective interests may ultimately appear, and libelant is entitled to maintain this action.

Eighth: By reason of the premises the libelant has sustained damage, as nearly as the same can now be estimated, in the sum of $110,000.00, no part of which has been paid although duly demanded.

Ninth: Libelant has performed all of the conditions precedent on its part to be performed under the terms of the aforesaid bills of lading.

Tenth: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays:

1) that process in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction issue against the Steamship MONROSA, her engines, tackle, etc., and that all persons claiming any right, title or interest in the said steamship may be cited to appear and answer upon oath all and singular the matters aforesaid, and that [fol. 10] the said steamship may be condemned and sold to pay the demands as aforesaid with interest, costs, and disbursements;

2) and that this Honorable Court will decree the payment by the said Steamship MONROSA to the libelant of the damages sustained by it as aforesaid, with interest, costs, and disbursements;

3) and that process in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against Navigazone (sic) Alta Italia, respondent herein, citing it to appear and answer on oath all and singular the matters aforesaid;

4) and that this Honorable Court may adjudge and decree that said respondent pay to libelant its damages as aforesaid with interest, costs and disbursements;

5) and that libelant may have such other and further relief as in justice it may be entitled to receive.

Hill, Rivkins, Middleton, Louis & Warburton, 96 Fulton Street, New York 38, New York.

Fulbright, Crooker, Freeman, Bates & Jaworski, Second National Bank Building, Houston 2, Texas, [fol. 11] (Signed) By: Carl G. Stearns, Proctors for Libelant.

* * * * * * *

Duly sworn to by Carl G. Stearns, jurat omitted in printing.

[fol. 12]

IN UNITED STATES DISTRICT COURT

STIPULATION TO ABIDE DECREE—Filed: April 9, 1956

Whereas a libel was filed in this cause on or about April 3, 1956, by Carbon Black Export, Inc., against the SS MONROSA, her engines, tackle, etc., and Navigazione Alta Italia, for the reasons and causes in said libel mentioned, and a claim has been filed by Navigazione Alta Italia, a corporation, to said vessel, and the said claimant, Navigazione Alta Italia, and National Surety Corporation its surety, the parties hereto hereby consenting and agreeing, that in case of default or contumacy on the part of said claimant or its surety, execution may issue against their goods, chattels and lands for the sum of One Hundred Thousand ($100,000.00) Dollars.

Now, Therefore, It Is Hereby Stipulated and Agreed, for the benefit of whom it may concern, that the stipulators undersigned are, and each of them is, bound in the sum of One Hundred Thousand ($100,000.00) Dollars, conditioned that the claimant above named shall abide by and pay the money awarded, including costs of court, by the final decree rendered in the cause by this Court, or in case of an appeal by the Appellate Court.

Navigazione Alta Italia, By Illegible, Principal, Its Proctors.

[fol. 13] National Surety Corporation, By Ben S. Moore, Surety.

(Seal)

Taken and acknowledged as to the claimant this 9 day of April, 1956.

(Signed) Mrs. Louise Hill, Notary Public in and for Harris County, Texas.

(Seal)

Taken and acknowledged as to the surety this 9 day of April, 1956.

(Signed) Mrs. Louise Hill, Notary Public in and for Harris County, Texas.

(Seal)

Approved:

Hill, Rivkins, Middleton, Louis & Warburton.

Fulbright, Crooker, Freeman, Bates & Jaworski,
(Signed) By Carl G. Stearns, Proctors for Libellant.

[fol. 14]

IN UNITED STATES DISTRICT COURT

RESPONDENT'S MOTION TO DECLINE JURISDICTION—
Filed: July 27, 1956

Comes now the Respondent, Navigazione Alta Italia, and moves the Court to decline jurisdiction of this cause, and as grounds therefor, would respectfully show:

1.

The libel, a cause of cargo damage, civil and maritime, alleges the issuance of a number of bills of lading by respondent, covering a cargo of carbon black loaded aboard the SS MONROSA at the Port of Houston, Texas for carriage to certain Italian ports, as more fully appears from the allegations contained in Article Fourth of said libel.

2.

All of the bills of lading referred to in Article Fourth of said libel contain the following clauses regarding jurisdiction of legal proceedings respecting any loss or damage

to cargo carried and regarding the law applicable to all such proceedings arising out of cargo damage or loss under the bills of lading, the contracts of carriage:

"Clause 27—Also, that no legal proceedings may be brought against the Captain or ship owners or their agents in respect to any loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other Tribunal in the place or [fol. 15] places where the goods were shipped or landed is incompetent, notwithstanding that the ship may be legally represented there."

"Clause 28—Also, that this contract is governed by the law of the steamer, carrying the goods, but any average that may arise on the voyage to be adjusted according to conditions named on the reverse side."

"Clause 29—Also, that in regard to all and everything which is not regulated and provided for in the present contract of transport, the regulation of the Italian Commercial Code will be in vigour."

"Clause 32—This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such terms shall be void to that extent, but no further."

3.

The Libellant has assented to this, a reasonable jurisdictional agreement by virtue of his entry into the contracts of carriage, the bills of lading.

[fol. 16]

4.

Respondent would show that the jurisdictional agreement herein is reasonable for the following reasons:

1. The vessel is owned by a Genoese corporation.

2. The vessel's witnesses are Italians, residing in Italy with no expectation of being in the United States at time of trial.

3. The cargo was discharged in Italy, and in part in the Port of Genoa, Italy, and was there surveyed and the damages segregated and the condition of the cargo noted.

4. Clause 8 of the Bill of Lading provides that in the event of claims for short delivery and damage, the value of the cargo shall be determined as of its market price at the port of destination, on the day of the vessel's arrival in the Italian port; accordingly, testimony as to market value will have to be obtained in Italy.

5. The seaworthiness of the vessel before, at the beginning of, and during the course of the voyage will be one of the main issues in this case and all repairs and surveys of the vessel, both before the voyage in question, and following its completion were performed in Italy, and accordingly, all evidence regarding inspection, repairs and seaworthiness in general will be more readily available to the Italian Court.

[fol. 17] 6. General average has been declared in Italy and all computations required and adjudication thereof is being accomplished in Italy.

7. If United States shippers elect to move their goods on foreign vessels, thereby obtaining favorable rates and routings, it is reasonable that their assent to foreign jurisdictions for suits arising from damage to the cargo should be given its contractual effect.

5.

Respondent further urges the Court to decline jurisdiction under the doctrine of forum non conveniens and as grounds therefor, would respectfully refer to the reasons and causes in paragraph 4 supra, and the assent given by Libellant to litigate in Genoa as part of the contract of carriage.

Wherefore, Premises Considered, Respondent, Navigazione Alta Italia, moves the Court to decline jurisdiction and grant Respondent its costs in its behalf expended.

Respectfully submitted, Royston & Rayzor, (Signed) By E. D. Vickery, MLC, 877 San Jacinto Building, Houston, Texas, Proctors for Respondents.

[fol. 18] *Duly sworn to by M. L. Cook, jurat omitted in printing.*

[fol. 19]

NOTICE OF MOTION

To: Messrs. Hill, Rivkins, Middleton, Louis & Warburton, and, Messrs. Fulbright, Crooker, Freeman, Bates & Jaworski, Bank of the Southwest Building, Houston, Texas, Proctors for Libellant.

Please take notice that the above Motion will be presented to the Court and an immediate ruling requested thereon on September 10, 1956, or as soon thereafter as the same may be heard.

Royston & Rayzor, (Signed) By Illegible, Proctors for Respondents.

Certificate of Service (omitted in printing).

[fol. 20]

BILL OF LADING COVERING 25 BAGS OF CARBON BLACK—Dated: Dec. 15, 1955

(This Bill of Lading was attached to Memorandum in Support of Respondent's Motion to Decline Jurisdiction.)

Bill of Lading issued under agreement with Liverpool Bill of Lading Conference (1907) Committee

B/L No. .....

CREOLE LINE

(NAVIGAZIONE ALTA ITALIA)

GENOA, ITALY

J. R. MICHELS, JR.

U. S. GULF & SOUTH ATLANTIC TO GENOA, LEGHORN, NAPLES & OTHER MEDITERRANEAN PORTS

SHIPPED BY (or received for shipment from) CARBON BLACK EXPORT, INC. in apparent good order and condition on board the Italian Steamship MONROSA or other Steamer, owned, controlled or operated by Nav. Alta Italia from HOUSTON, TEXAS to the Port of GENOA, ITALY with liberty either before or after proceeding towards the port of discharge to proceed to, and/or stay at, any ports or places whatsoever although in a contrary direction to, or out of, or beyond, the route to the said port of discharge, once or oftener, in any order, backwards or forwards, for the purpose of dry docking (even with cargo on board), or loading or discharging cargo or passengers, or for any purpose whatsoever. Nothing in this bill of Lading, whether written or printed or implied therefrom, shall limit or affect the provisions of this clause.

PARTICULARS FURNISHED BY SHIPPER OF GOODS

MARKS AND NUMBERS	ARTICLES	SAID TO WEIGH
Net Wt. 50 lbs. Code 110 Genoa Hess Kosmos Monogram Kosmos 2 Made in USA UCCO	25 Twenty five (25)—50# Multiwall Bags "Kosmos 2" Carbon Black Net Wt. 1250 lbs. These Commodities Licensed by U.S. for Ultimate Destination Italy Diversion Contrary to U.S. Law Prohibited.	1291 lbs.

CH 6576
Exp. Lic. C5-718-60061
Each Bag Measures: 1.95 CF
Ex Car: LN 5915

"OCEAN FREIGHT PREPAID"

COPY
NOT NEGOTIABLE
Subject to York-Antwerp Rules 1950

Substitution of another vessel of different ownership is only permissible in case the named vessel is lost, or in case of accident, or other unforeseen event of force majeure.

UNDER DECK, (weight, measurement, quality, quantity, gauge, contents and value unknown and shipowners not accountable for same), and to be delivered in like good order and condition at the Port of GENOA, ITALY or so near thereto as she may safely get and always lie afloat, unto the ORDER OF: DITTA G.E. HESS 1 VIA MONTE-CUCCOLI TURIN 103 ITALY or his or their assigns, he or they paying freight, unless prepaid, and charges in cash, on arrival at Port of Discharge, in exchange for delivery order, without any allowance of credit or discount on the said goods on actual Gross weight shipped or on delivered weight, ship's option, as specified below.

PARTY TO NOTIFY: SAME AS ABOVE

FREIGHT AND CHARGES

48.75 C. F.	at 40¢	per C. F.	$ 19.50
		TOTAL	$ 19.50

The word "steamship" or "steamer" as used in this form of bill of lading is understood to include and to stand for "motorship" as the case may require.

Notwithstanding anything to the contrary that may be printed herein all Freight and Charges, or short paid freight, if any collectible under this Bill of Lading in Italy, are to be converted into Lire at the quoted rate for Sight Bills Genoa on New York on the date of the vessel's entry at the Custom House at Port of Discharge.

The vessel is entitled to discharge at the usual discharging berth of the line and/or at any wharf and/or into lighters.

The rate of freight is adjusted upon the basis of the following exceptions and agreements:

In case the cargo or any portion thereof shall be shut out of the vessel, the master or agent shall have liberty to forward by another steamer or steamers (at the risk of the owners of said cargo). Notice of such forwarding shall be sent to the shipper when practicable and any difference in freight resulting therefrom shall be paid or received by

the shipowner. Merchandise on wharf awaiting shipment or delivery is at shipper's risk.

The said ship or any other vessel employed in any part of the transport shall be at liberty to delay, or anticipate her advertised sailing date either before or after proceeding towards the port of destination, to proceed to and call at any ports or places whatsoever (although in a contrary direction to or out of or beyond the accustomed route to the port of destination), to return to her loading port or ports, once or oftener in any order and for any purpose whatsoever, and in all cases such ports, places and sailings shall be deemed to be included within the intended voyage; also to sail, with or without pilots; to have liberty to swing or manoeuver, to adjust compasses or to remove from one berth to another, or be drydocked with cargo on board whether prior to the commencement of, after the termination or at any stage of the voyage; to carry goods on deck; to carry goods of all kinds, dangerous or otherwise; to deviate in any manner and for any purpose whatsoever, any warranty or rule of law to the contrary notwithstanding; to transship or land and reship by lighter or otherwise at port of shipment or at any other port or ports into any other ship or conveyance; to tow or to be towed, and to assist vessels in all situations. All the liabilities, conditions and exceptions of this Bill of Lading shall apply to any carrying vessel (any custom or rule of law notwithstanding) although the vessel may have deviated from the contract voyage or customary or intended route of voyage and although such deviation may amount to change or abandonment of the voyage and notwithstanding unseaworthiness or unfitness of the vessel at the commencement of or at any period of the voyage. The carrier shall have the liberty to convey goods in craft and/or lighters to and from the steamer at the risk of the owners of the goods and in case the steamer shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to transship the goods to their destination by any other steamer, rail line, or lighter at shipper's risk; the carrier shall not be liable for loss or damage occasioned by perils of the sea or other waters, by fire from any cause whatsoever occurring, barratry of the master or crew; by

enemies, pirates, robbers or thieves, by arrest and restraint of princes, rulers of people, riots, strikes, lockout or stoppage of labor from any cause whatsoever, by explosion, bursting of boilers, breakage of shafts or any other latent defect in hull, machinery or appurtenances, or unseaworthiness of the steamer whether existing at time of shipment or at the beginning of the voyage, provided the owners have exercised due diligence to make the steamer seaworthy; by heating, frost, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, vermin, or by explosion of any of the goods, whether shipped with or without disclosure of their nature, or any loss or damage arising from the nature of the goods, or the insufficiency of packages, nor for land damages; nor for obliteration, errors, insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk or transshipment; nor for any loss or damage caused by the prolongation of the voyage; nor for any damage to any goods, however caused which is capable of being covered by insurance, and the carrier shall not be concluded as to correctness of statements herein of quality, gauge, contents, weight and value. In case of general average, whatever be the destination of the goods on board, settlement shall be effected amicably at Genoa at the request of the Shipowners according to the York-Antwerp Rules 1950, and, for any matter not contemplated in these rules according to the usages of the Port of Genoa. Lacking these, recourse shall be had to the rules of the Italian Commercial Code.

Receivers must accept and sign the Average Bond appointing one or two Average Adjusters, chosen by the Shipowners from amongst the Adjusters recognized and authorized by the Tribunal or by the Chamber of Commerce of Genoa.

Receivers must disburse to the Shipowners or their agents on signature of the Average bond, the sum which will be requested as a temporary deposit due by the goods, binding themselves also by the said Average Bond to recognize and pay the final contribution apportioned as payable on Adjustment of the Average. Consignment of the goods to the Receiver shall not be effected until the execution of the disposition herein contained.

It is mutually agreed that the ship is warranted seaworthy solely in the sense that the Ship owners will have used every diligence in rendering her such; and in proof that such diligence has been used, it will be sufficient to show the Certificate of the Classification Registry in effect at the time.

In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which, the carrier is not responsible, by statute, contract or otherwise, the goods, shippers, consignees or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if the said ship or ships belonged to strangers. Such deposit as the carrier or his agents may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the goods, shippers, consignees or owners of the goods to the carrier before delivery.

This shipment is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled "An Act relating to the navigation of vessels," etc., and in the absence of fraud, clerical or obvious error, this Bill of Lading, signed by the Master or Agent, shall be conclusive evidence against the Shipowner that the above mentioned cargo has been received, if the number of packages agree with the mate's and/or tally clerk's receipt.

Todos los impuestos, lanchages, derechos y gastos de descarga limpia de Puerto y cuarentena son de cuenta y a cargo del receptor aun cuando se cobren o liquiden al vapor.

AND FINALLY, in accepting this Bill of Lading, the Shipper, Owner and Consignee of the goods and the holder of the Bill of Lading, agreed to be bound by all of its stipu-

lations, exceptions and conditions, whether written, printed or stamped on the front or back hereof, as fully as if they were all signed by such Shipper, Owner, Consignee or holder, any local customs or privileges to the contrary notwithstanding.

IN WITNESS WHEREOF, the Master or Agent of said vessel hath affirmed to three Bills of Lading, all of this tenor and date, one of which being accomplished and given up to the carrier, the other to stand void.

FOR AND ON BEHALF OF
NAVIGAZIONE ALTA ITALIA

BY TEXAS TRANSPORT AND TERMINAL CO., INC.
AS AGENTS ONLY

BY J. R. TAYLOR

Dated in HOUSTON, TEXAS

DEC 15 1955

Continued over page

In addition to the liberties printed in the Bill of Lading, it is clearly stated that the steamer carrying this cargo is entitled to proceed and call at any port of the U. S. A. in the Gulf of Mexico and Southern Atlantic, and also to call at any Italian and Foreign port in the Mediterranean, to load and discharge goods and/or passengers or for any other purposes whatsoever.

ATTENTION OF SHIPPERS IS CALLED TO SECTION 235 OF THE UNITED STATES PENAL LAWS. Every package containing explosives or other dangerous articles when presented to a common carrier for shipment, SHALL HAVE PLAINLY MARKED ON THE OUTSIDE THEREOF THE CONTENTS THEREOF; and it shall be unlawful for any person to deliver or cause to be delivered to any common carrier engaged in interstate or foreign commerce by land or water, for interstate or foreign transportation, or to carry upon any vessel or vehicle engaged in interstate or foreign transportation any explosive or other dangerous article under any false or deceptive

marking, description, invoice, shipping order or other declaration, or without informing the agent of such carrier of the true character thereof at or before the time such delivery for carriage is made. "Whosoever shall knowingly violate or cause to be violated any provisions of this section or of the three sections last preceding or any regulation made by the Interstate Commerce Commission in pursuance thereof, shall be fined not more than $2,000 or imprisoned not more than eighteen months or both." And it is hereby understood and agreed that the shipper shall be responsible to the carrier for all damages directly or indirectly arising out of the shipment of the above named or any other goods of a dangerous or damaging nature, unless notice is given as above provided.

1.—IT IS AGREED that the shipowner has offered the shipper a choice of rates computed in consideration of all the terms of this contract and the value of the cargo, the lowest rate quoted for the carriage of goods applying if the shipment is made under the conventional valuation specified in this paragraph, and a higher ad valorem rate applying if a higher value is declared by the shipper. Unless such higher value shall be declared by the shipper and written in this bill of lading and freight paid on the basis of such value, the shipper represents and agrees that the value of the goods is the invoice value unless in shipments in packages such value exceeds $250 per package or shipping unit. In such case the goods are valued at $250 per package or other shipping unit, at which limit of value the shipper elects to ship for the purpose of securing the lower rate. Unless a higher value is declared as aforesaid, such conventional valuation, or the actual value of the goods if less than such conventional valuation, shall constitute the measure of damage in any claim that may arise against the shipowner as carrier, bailee, or otherwise, and in any liability for partial loss or damage shall be adjusted pro rata.

2.—ALSO, that the steamer, lighter or carrier shall not be liable for articles specified in Section 4281 of the Revised Statutes of the United States unless written notice of the true character and value thereof is given at the time of loading and entered in the Bill of Lading.

3.—ALSO, that the shippers shall be liable for any loss or damage to steamer, cargo, lighter or wharf, caused by inflammable, explosive or dangerous goods shipped without full disclosure of their nature, whether such shipper be Principal or Agent, and such goods may be thrown overboard or destroyed at any time without compensation. Extra charges, if any, for discharging lighterage or other expenses on hazardous goods, declared or considered as such by civil or military authorities, must be borne by shippers and/or consignees.

4.—ALSO, that the carrier shall have a lien on the goods for all freights, primages and charges, and also for all fines or damages which the steamer, lighter or cargo may incur or suffer by reason of the incorrect or insufficient marking, numbering or addressing of packages or description of the contents. Bills of Lading must be made out in accordance with the prescription and regulations of port, customs or Consular authorities. Consular, Board of Health or other certificates required to accompany the goods are to be procured by shippers, and any detention, charges or penalties occurring to steamer or cargo, owing to the want of such certificate, are to be borne by the shippers and/or consignees.

5.—ALSO, the vessel to be entitled to commence discharging immediately upon arrival and discharge continuously or intermittently at any time during day and/or night, including Sundays and holidays, any custom of the port to the contrary notwithstanding. The vessel to have the option of discharging and making delivery of the goods, any custom of the port to the contrary notwithstanding, either to lighters or similar craft of any description, or to Custom House, warehouse, wharf, dock or quay, at owners of the goods risk, the carriers' liability in all cases ceasing as soon as the goods are free from the ship's tackles. The carriers to have the liberty to store the goods in warehouse, lazaretto, hulk or craft of any description, at the sole risk and expense of the owners thereof. All expenses exship's tackles, including delivery at current rates from thence, quay dues and expenses, lighterage, canal dues, storage, weighing, measuring, etc., are for account of the goods.

The steamer's responsibility to cease immediately the goods are discharged from the steamer's deck, when the goods shall be deemed delivered, but the steamer shall have always a lien on the goods for freight and charges of whatsoever nature, and the goods will not be consigned until after such payment.

6.—ALSO, that full freight is payable on damaged or unsound goods, but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage. Freight and charges shall become due and payable pro rata for any portion of this shipment on its arrival at destination.

7.—ALSO, that if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

8.—ALSO, that in the event of claims for short delivery when the steamer reaches her destination, the prices shall be the market price at the port of destination on the day of the steamer's entry at the Custom House less all charges saved. All claims for short delivery, loss, damage, or of whatever nature, also return of prepaid freight on quantity short shipped, must be made in writing to the steamer's agent at the port of destination of the goods, within 5 days after the steamer or lighter has finished discharging and ALWAYS BEFORE the goods are taken delivery of by the consignees, and in case such claims shall not be presented in writing within the time and the place hereinbefore designated such loss or damage shall be deemed to be waived and the steamer discharged therefrom. Compensation or claims for missing goods will not be allowed or entertained beyond the amount stated in the original invoice, which must be produced in substantiation.

9.—ALSO, that merchandise on wharf or lighter, or other craft, awaiting shipment or delivery be at shipper's risk of loss or damage not happening through the fault, or negligence of the owner, master, agent or manager of the steamer, any custom of the port to the contrary notwithstanding.

10.—ALSO, that this Bill of Lading, duly endorsed, be given up to the steamer's agent in exchange for delivery order.

11.—ALSO, that the freight prepaid will not be returned, goods lost or not lost.

12.—ALSO, that parcels for different consignees, collected or made up in single packages addressed to one consignee pay full freight on each parcel.

13.—ALSO, that all goods destined for points beyond the steamer's ports of call are subject to all conditions, stipulations and exceptions expressed in the customary form of Bill of Lading, in use at the time of shipment by carrier or carriers completing the transit; neither the vessel, her owner, nor agent shall be deemed to be the agent of such carrier or carriers. ALSO, that the goods to be forwarded at steamer's expense but at shipper's risk. If, upon arrival at port of transshipment, there shall be no carrier ready to receive the goods, said goods may be discharged into lighters or stored under suitable, available protection, at the risk and expense of the goods. Neither the vessel, her owner, nor Agent shall be liable for loss, damage, or delay occurring after the discharge of said goods.

14.—ALSO, if the goods are consigned to a point where the vessel does not discharge, the shipper constitutes the shipowner his agent to forward the goods to or toward their ultimate destination and all liability whatsoever of the shipowner as carrier, bailee or otherwise shall cease upon the goods leaving the actual custody of the shipowner. Such forwarding carriage shall be subject to the terms of the usual bill of lading, receipt, contract or shipping document of the on-carrier whether issued or not, including, but without limiting the generality of the foregoing, any valuation of the goods, or limitation of liability, or exemption from liability, or the requirement for notice of claim or commencement of suit, even though such terms be less favorable to the shipper than the terms of this bill of lading, whether known to the shipper or not, even though exempting the on-carrier from liability for negligence.

Unless the value of the goods is declared at the time of shipment hereunder and is stated herein, and extra freight as may be agreed upon is paid by the shipper, consignee and/or owner of the goods, the shipowner shall in no event be obligated to declare to the on-carrier any valuation of the goods, even though the on-carrier's bill of lading, receipt or shipping document contains a valuation or limitation of liability less than that contained in this bill of lading.

15.—ALSO, that in case the final port of destination is closed by ice or the last regular steamer of the season from port of transshipment is fully engaged, or already fully loaded, or in case the final port of destination is declared infected, the carriers are at liberty to forward the goods to any other port apparently nearest accessible to which a regular service is maintained, or to warehouse the goods at intermediate port or ports at the risk and expense of the owners of the goods and to forward the said goods to destination as soon as practicable. Full freight is due on goods thus forwarded and the terms of the through Bill of Lading are to be considered fulfilled in every respect. If owners of the goods desire transportation by rail it will be for their account. Should the owners of the goods desire to give special orders for the forwarding from port of transshipment, they must do so at latest on arrival of the goods there and carriers will comply with such orders as far as possible, but always at the risk and expense of the owners of the goods.

16.—ALSO, that all weights are subject to correction, and where goods are weighed or measured by the carrier to ascertain freight, the expenses for reweighing shall be paid by the consignee, any custom of the port to the contrary notwithstanding; the Consignees also to pay any excess of freight discovered, and the carrier to have a lien on the goods for such charges.

17.—ALSO, that no claim shall, under any circumstances whatsoever, attach to any steamer or her owners for failure to notify consignees or any other party of arrival of goods.

18.—ALSO, that single packages exceeding one ton in weight shall be liable to pay extra charges, if any, for loading, handling, transshipping or discharging. Also, that the steamer or any of the servants of the company shall not be liable for any damage or loss occurring from accident in loading, handling, discharging or transshipping of packages exceeding one ton in weight. And in case of any damage or loss resulting to steamer, cargo, lighters, cranes or hoisting tackle, owing to incorrect weight having been declared, the shippers and/or consignees of such cargo shall be responsible for such loss or damage.

19.—ALSO, that in case the entry of the port of discharge or communication therewith, rendering or being liable to render the vessel liable to quarantine at any subsequent port, or in case of the master considering the entry of any port either from epidemic or otherwise unsafe or injurious to the further prosecution of the steamer's intended voyage, the goods may be landed or put into lazaretto, bulk, or lighter, at any other available port the master may consider safe, at shipper's risk and expense, and thereupon the liability of the steamer or carrier hereunder shall absolutely cease. In the event of quarantine, the goods may be discharged on arrival into quarantine depot, bulk, lighter or other vessel necessary for the ship's dispatch, at the consignee's risk and expense, or the master may carry on the goods to the nearest convenient port and there land them; advices mailed to consignees, if named, or otherwise to shippers, shall be deemed under this agreement a due delivery of said goods, and such goods shall be liable and a lien held thereon for all quarantine expenses incurred in consequence.

20.—ALSO, that if on arrival of the steamer off the port of destination it is impossible or unsafe to enter and commence discharging immediately, on account of weather, strikes, lockouts, earthquake, epidemic, interdict, prohibition of importation, riot, war, decrees of port authorities, congestion of port with notorious consequent detention, or other disturbance, or for any other cause beyond the control of said steamer or steamers, the Master is entitled to proceed to any convenient neighboring port or ports and

there discharge the goods for transshipment to destination, or retain them on board for delivery upon return at the Master's option, but at the risk and expense of the owners of said goods. If landed at the next convenient port and advices hereof mailed to consignees, if named, or otherwise to shippers, a due delivery of said goods under this agreement shall be deemed to have been affected, and goods to be liable for all extra expenses incurred in consequence and subject to a lien for the same.

21.—ALSO, that if any bag or baled goods are landed slack or torn, the consignees shall accept such portion of the sweepings as shall be allotted by the steamer's agent, and the same shall be deemed a full settlement of any claim for losses in weight.

22.—ALSO, that for metal in slabs, bars, ingots, rods, hoops, plates, etc., or any other articles shipped loose or in bundles, steamer shall not be held responsible for the total number of pieces or for their respective marks and/or weight and/or measurement, or for breakage or loss of broken pieces.

23.—ALSO, that freight is to be paid on barrels whether full, part full or empty. Ship not responsible for leakage, breakage, nor rust.

24.—ALSO, that the steamer shall have liberty to carry cargo on deck, or livestock on deck and/or under deck.

25.—ALSO, that the ship shall not be liable for number of pieces of lumber when shipments of this article consist of thin or short pieces; nor for number of small staves; nor for splits, shakes, broken bundles, marks, weight or measurement. When goods are shipped together with other lots, ship shall not be liable for expense of sorting marks. Receivers to pay the cost of assorting staves at destination.

26.—ALSO, that where grain is stowed together with other grain without separation, either from the same or another shipper, each Bill of Lading shall bear its proportion of loss and/or damage, if any.

27.—ALSO, that no legal proceedings may be brought against the Captain or Shipowners or their Agents in

respect to any loss of or damage to any goods herein specified except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, not withstanding that the ship may be legally represented there.

28.—ALSO, that this contract is governed by the law of the steamer carrying the goods, but any average that may arise on the voyage to be adjusted according to conditions named on the reverse side.

29.—ALSO, that in regard to all and everything which is not regulated and provided for in the present Contract of Transport, the regulation of the Italian Commercial Code will be in vigour.

30.—ALSO, notwithstanding anything to the contrary that may be printed in this bill of lading steamer is not obligated to give receivers overside delivery, except in specific instances where this privilege is granted by a stamped clause to that effect on this bill of lading.

31.—ALSO, if cotton be shipped hereunder, it is mutually understood and agreed that the description of the condition of the cotton does not relate to insufficiency of nor the torn condition of the covering, nor to any damage resulting therefrom, and that no carrier shall be responsible for any damage of such nature nor for any damage not caused by its negligence.

32.—This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods By Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further.

33.—Goods may be stowed in poop, forecastle, deck house, shelter deck, passenger spaces or any other covered in space commonly used in the trade and suitable for the carriage of goods, and when so stowed shall be deemed for all

purposes to be stowed under deck. In respect of goods carried on deck all risks of loss or damage by perils inherent in such carriage shall be borne by the shipper or the consignee but in all other respects the custody and carriage of such goods shall be governed by the terms of this bill of lading and the provisions stated in said Carriage of Goods by Sea Act notwithstanding Sec. 1 (e) thereof, or the corresponding provision of any Carriage of Goods by Sea Act that may be applicable. Specially heated or specially cooled stowage is not to be furnished unless contracted for at an increased freight rate. Goods or articles carried in any such compartment are at the sole risk of the owner thereof and subject to all the conditions, exceptions and limitations as to the Carrier's liability and other provisions of this bill of lading; and further the Carrier shall not be liable for any loss or damage occasioned by the temperature, risks or refrigeration, defects or insufficiency in or accidents to or explosion, breakage, derangement or failure of any refrigerator plant or part thereof, or by or in any material or the supply or use thereof used in the process of refrigeration, unless shown to have been caused by negligence of the Carrier from liability for which the Carrier is not by law entitled to exemption.

34.—If the liability for any collision in which the vessel is involved while performing this bill of lading fails to be determined in accordance with the laws of the United States of America, the following clause shall apply:—

If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss on liability to the other or non-carrying ship or her owners insofar as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier.

The foregoing provisions shall also apply where the Owners, Operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect to a collision or contact.

35.—In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought until jurisdiction shall have been obtained over the Carrier and/or the ship by service of process or by an agreement to appear.

36.—SPECIE: Specie will not be shipped or landed by the Carrier; it must be put on board by the shipper, and will only be delivered on board on presentation of the bills of lading properly endorsed; it may be carried on at consignee's risk if delivery is not taken during the ship's stay in port; and in every case the liability of the Carrier shall cease when the specie leaves the ship's deck.

37.—The contract or intended voyage, as herein described includes calls for any purpose whatsoever, whether in connection with the present, a prior, or succeeding voyage.

38.—The vessel in addition to all other liberties shall have liberty as part of the contract voyage and at any stage thereof to proceed to any port or ports whatsoever whether such ports are on or off the direct and/or customary route or routes to the ports of loading or discharge named in this Charter and there take oil bunkers in any quantity in the discretion of owners even to the full capacity of fuel tanks, deep tanks and any other compartment in which oil can be carried whether such amounts is or is not required for the chartered voyage.

39.—WAR RISK CLAUSE.—The ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or otherwise howsoever given by the Government of the Nation under whose flag the vessel sails or any department thereof, or any person acting or purporting to act with the authority of such Government or of any depart-

ment thereof, or by any committee or person having, under the terms of the War Risks Insurance on the ship, the right to give such orders or directions and if by reason of and in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a deviation, and delivery in accordance with such orders or directions shall be a fulfillment of the contract voyage and the freight shall be payable accordingly.

In the event of war, warlike disturbances or conditions, existing or threatened, vessel may abandon the voyage, put into or remain at any port, and discharge the cargo at any port, if in the judgment of the master or owner conditions render it advisable; and in connection herewith if cargo be discharged at any port after the voyage begins, same shall be deemed a complete delivery under the contract and full freight shall be considered earned.

"The goods covered by this bill of lading are accepted for shipment subject to the express condition that, should said goods be subjected at any time or place to inspection or control by any belligerent power, carrier will not be responsible for any damage or deterioration of whichever nature caused thereby or by any incidental delay, and said goods will only be delivered at destination provided, following any such inspection or control the said goods are left undisturbed in the vessel at the disposal of the carrier without restrictions, and always subject to the terms and conditions of this bill of lading."

ENDORSEMENT

[fol. 21]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF CARL G. STEARNS IN OPPOSITION TO MOTION TO DECLINE JURISDICTION—Filed: Sept. 21, 1956

State of Texas,
County of Harris, ss.:

Carl G. Stearns, being duly sworn, deposes and says:

I am a partner of Fulbright, Crooker, Freeman, Bates & Jaworski, proctors for the libelant in the above case,

and am in charge of the litigation for the libelant and familiar with the facts relating thereto.

Libelant, Carbon Black Export, Inc., is a citizen of the United States, being a corporation organized and existing under the laws of the State of Delaware, with its principal office at 420 Lexington Avenue, New York, N. Y.

Respondent, Navigazione Alta Italia, operating under the trade name of "Creole Line", is an Italian corporation and owner and operator of the S. S. MONROSA and numerous other steamships. It operates a fleet of cargo ships between Houston and other Gulf Ports on the one hand and Italian and other Mediterranean ports on the other hand. It has regularly scheduled service between such ports. Its ship MONGINEVRO sailed from Houston on or about September 6, 1956, and it has scheduled to sail from Houston the MONBALDO on September 30, the MONSTELLA on October 8, and the MONDORO on October 22, 1956. Lloyds [fol. 22] Shipping Index, photostatic copy of a sheet of which is attached hereto shows that the MONROSA arrived at Corpus Christi on September 10, and it is likely that she will load cargo at Houston and/or other Gulf ports. She was in Houston from April 7 to April 10, 1956, subsequent to the libel herein being filed on April 3, 1956. Respondent Navigazione Alta Italia maintains an office in the Cotton Exchange Building, Houston, where it carries on a regular steamship business. Its Houston agents are Texas Transport and Terminal Co., Inc., with offices in the Cotton Exchange Building, Houston. Its bills of lading are printed in English and show on their faces in large type that Texas Transport and Terminal Co., Inc., is its agent—a photostatic copy of one of its bills of lading involved in the above case is attached hereto and made a part hereof.

The above suit is one for cargo loss and damage. The libelant, on December 15, 1955, shipped 12,060 bags of carbon black on the MONROSA at Houston, and, on December 23, 1955, shipped 17,239 bags of carbon black on the MONROSA at New Orleans, all consigned to various ports in Italy. Subsequently, the MONROSA arrived at Genoa, Italy, and discharged the carbon black in a seriously damaged condition. Libelant sues for $110,000. damages for such loss and damage.

Libelant filed its libel on April 3, 1956, and service was had on the same day on the respondent by serving citation on Texas Transport and Terminal Co., Inc., as agent for said respondent. A *general appearance* was filed on behalf of said respondent by Messrs. Royston & Rayzor on April 9, 1956. A warrant of seizure was not issued for the MONROSA upon the agreement of Royston & Rayzor [fol. 23] to file release bond in the amount of $100,000. and also claim of owner for the MONROSA on behalf of respondent, Navigazione Alta Italia, her owner. Said notice of general appearance, release bond, and claim of owner are still on file in the office of the Clerk of this Court.

The respondent having voluntarily entered a *general* appearance, it has *waived* its right, if any, to contest the jurisdiction of this Court and to file a motion for this Court to decline jurisdiction—see authorities in supporting memorandum of authorities.

If this Court should decline jurisdiction and dismiss the libel, the release bond of $100,000. would be cancelled and the libelant left without security. If the bond should be cancelled, the libelant might not be able to again attach the MONROSA in Italy, and, if so, likely would not be able to obtain adequate security due to the applicable Italian laws, exchange difficulties, etc. The respondent has not shown how and in what amount the libelant could obtain security in Italy, if the libel herein is dismissed and the release bond cancelled. In fact, it has not made any showing of the efficacy of a resort to the Italian courts.

Clause 27 of the respondent's bill of lading, set forth in respondent's motion and memorandum, does not bar suit *in rem* against the MONROSA and her seizure, but it purports only to bar legal proceedings against the "Captain or ship owners or their agents". In this suit the MONROSA is proceeded against directly *in rem* and release bond and claim of owner has been filed on her behalf. Accordingly, if Clause 27 of the bills of lading, perchance should be held to be valid and bar suit *in personam* against the respondent, it [fol. 24] should not be held to bar the suit proceeding *in rem* against the MONROSA.

If libel herein is dismissed and the libelant forced to resort to the Italian courts, the *libelant* would have to put

up a substantial bond in the Italian courts, which it does not have to do herein. Also, the libelant might be held liable in the Italian courts for respondent's attorney fees, which it would not herein.

Clause 32 of the bills of lading provides that they "shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States". Accordingly, this Court should retain jurisdiction to interpret and apply the said law of the United States and not leave it to be interpreted and applied by the Italian courts.

There are the following additional reasons that this Court should retain jurisdiction:

1. There is no question that this Court has jurisdiction of the respondent *in personam* and the MONROSA *in rem*. The only question presented by respondent is whether or not this Court should decline to exercise the jurisdiction it unquestionably has.

2. The libelant is an American citizen and, accordingly, should be entitled to sue in the courts of the United States and not be forced to pursue doubtful litigation in the courts of Italy.

3. Where there is a choice of forums, the libelant has [fol. 25] the right of choice. Libelant chose to sue in this country in preference to Italy, as it was entitled to.

4. The shipments were made from the Port of Houston. Only here is testimony available that the carbon black was in good order and condition when shipped.

5. The manner of stowage of the carbon black at Houston and New Orleans will be an important issue. Testimony in this connection will have to be taken of stevedores and other persons at Houston and New Orleans.

6. One of the most important issues will be the question of seaworthiness of the MONROSA prior to and at the time of loading at Houston. During the voyage to Italy sea water entered through wasted plates and other defects in No. 5 hold. Testimony will have to be taken at Houston as to the condition of her No. 5 hold before carbon black was loaded therein.

7. Libelant had the MONROSA surveyed at Houston subsequent to the loss by J. R. Bencal, Houston Marine Surveyor. His testimony is most important to the libelant.

8. Libelant is willing and able to produce all of its witnesses at Houston on the trial or take their depositions before trial.

9. Respondent's principal testimony will come from members of the crew of the MONROSA. The MONROSA operates regularly in service between Gulf ports and Italian ports. Accordingly, depositions of members of the crew could be taken at Houston or other Gulf port in the United [fol. 26] States. Since the respondent has an average of two ships per month at the Port of Houston, it could easily designate the MONROSA as one of these ships. The MONROSA is reported to have arrived at Corpus Christi on September 10, 1956. She was in Houston for four days subsequent to the filing of the libel, i.e. from April 7 to April 10, 1956, at which time depositions of her crew could have been taken—in fact, libelant endeavored to take such depositions but the respondent obtained an order of this Court prohibiting same.

Libelant answers the reasons alleged by the respondent in its motion for this Court to decline jurisdiction as follows:

1. It admits that the MONROSA is owned by an Italian Corporation.

2. It denies all the respondent's witnesses are Italians with no expectation of being in the United States at the time of the trial. No doubt, Respondent would call as witnesses the stevedores at Houston and representatives of Texas Transport and Terminal Co., Inc., its agents at Houston, in an endeavor to prove proper stowage and seaworthiness of the MONROSA at the time of departure from Houston. Also, respondent would likely call as a witness Captain R. L. Wynne, Houston Marine Surveyor, who surveyed the MONROSA at Houston on respondent's behalf. No doubt, the members of the crew of the MONROSA who respondent would call as witnesses are still on board her

or on other vessels of the respondent, calling regularly at the Port of Houston and other Gulf ports—in such [fol. 27] event, their depositions could readily be taken at Houston or other Gulf port.

3. It admits that the cargo was discharged in Italy and there surveyed and segregated. It will take the deposition of its surveyor in Italy or produce him on the trial.

4. It admits that Clause 8 of the bills of lading provides that the value of the cargo shall be determined as of its market price at the port of destination. Market value will not be an issue on the trial, but only on a reference after trial if libelant is successful on the trial. In any event the burden of proof would be on libelant to prove market price. Respondent is not in position to complain about the availability of *libelant's* witnesses.

5. Libelant admits that the seaworthiness of the MONROSA before, at the beginning of, and during the course of the voyage will be one of the main issues on the trial, but denies that testimony in this connection will be more readily available to the Italian court than to this Court. The most important issue will be the seaworthiness of the MONROSA at the time of loading and beginning her voyage at Houston. As pointed out above testimony in this respect will be from local witnesses and the crew of the MONROSA, which crew likely will be available for taking their depositions at Houston or other Gulf port prior to the trial.

6. General Average is not involved in this suit.

[fol. 28] 7. If United States shippers elect to move their goods on foreign vessels, they should be bound only by provisions of the bills of lading which are *valid* under the laws of the *United States,* which Clause 27 of the MONROSA bills of lading is not, as it has the effect of ousting United States courts of jurisdiction. Also, there is no evidence that a more favorable rate or routing was obtained by shipping on

the MONROSA rather than by a ship of United States registry.

Wherefore, libelant prays that respondent's motion to decline jurisdiction of this Court be denied.

(Signed) Carl G. Stearns

Sworn to before me this 21 day of September, 1956.

(Signed) Fleta B. Jones, Notary Public in and for Harris County, Texas.

* * * * * * *

Exhibit: Photostat of Bill of Lading Covering 1980 Bags of Carbon Black omitted from the printed record pursuant to the Joint Request for Printing Record.

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Exhibit: Photostat of Lloyd's Shipping Index omitted from the printed record pursuant to the Joint Request for Printing Record.

[fol. 29]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF E. D. VICKERY IN SUPPORT OF MOTION TO DECLINE JURISDICTION—Filed: October 2, 1956

The State of Texas,
County of Harris, ss.:

E. D. Vickery, being duly sworn, deposes and says:

I am a partner of Royston & Rayzor, Proctors for the Respondents in the above case and am in charge of the litigation for the Respondents and familiar with the facts relating thereto.

All of the factual allegations sworn to in Respondents' Motion to Decline Jurisdiction are reaffirmed as true and correct.

The additional factual allegations in the Memorandum In Support of Respondents' Motion to Decline Jurisdiction are likewise true and correct, and appear in the Memorandum as follows:

1. There were a total of 27 Ocean Bills of Lading issued at the ports of Houston and New Orleans covering the cargo of carbon black loaded aboard the Respondents' vessel SS MONROSA in December, 1955.

2. Since the voyage referred to in the Libel, the [fol. 30] Captain of the SS MONROSA has suffered a heart attack and is no longer aboard the vessel.

3. The port of Genoa, Italy was the first port reached by the SS MONROSA when it departed New Orleans bound for Italy and it was there that all of the cargo which was capable of being delivered was discharged and the remainder damaged to such an extent that it could not be delivered to the other Italian ports. Therefore it was at Genoa where the cargo was discharged and surveyed, the damages segregated and the condition of the cargo noted, not only by Respondents' representatives but by Libellant's representatives as well.

4. The Italian Courts are familiar with the United States Carriage of Goods by Sea Act and, along with the United States, have adopted the Bruxelles Convention of 1924 (certain uniform rules relating to Bills of Lading). Italy has been a maritime nation for centuries and there is no serious suggestion that its courts are incompetent to apply the United States Carriage of Goods by Sea Act fairly and justly; all of the above more fully appearing on pps. 11 and 12 of Respondents' Memorandum in Support of its Motion to Decline Jurisdiction.

In addition, affiant knows the factors listed below in Respondents' Memorandum in reply to Libellant's Memorandum and Affidavit are true and correct:

1. That Lykes Bros. Steamship Co., Inc., among others, maintains regular services to these Italian [fol. 31] ports, Trieste, Genoa, Venice and Naples, with vessels sailing from the Gulf to such ports each two weeks.

2. Testimony respecting the seaworthiness of the hull of the SS MONROSA when it departed Houston

and New Orleans is primarily obtainable from Italian surveyors and the crew of the SS MONROSA, since no hull surveys of the SS MONROSA's cargo holds were made by American surveyors at Houston and New Orleans prior to the vessel's departure on the voyage in question.

Wherefore, Respondents pray that the Court grant its Motion to Decline Jurisdiction and dismiss the Libel.

(Signed) E. D. Vickery

Sworn and subscribed to before me, this 2nd day of October, 1956.

(Signed) Hildegarde E. Slaughter, Notary Public in and for Harris County, Texas.

Certificate of Service (omitted in printing).

[fol. 32]

IN UNITED STATES DISTRICT COURT

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI, (Carl G. Stearns), of Houston, Texas, Proctors for Libelant.

ROYSTON & RAYZOR, (E. D. Vickery), of Houston, Texas, Proctors for Respondent.

OPINION—Filed: December 31, 1956

Since the agreement (bills of lading) between Libelant and Respondents to sue or be sued only in the Courts of Genoa, Italy, and because it is not shown that said agreement is unreasonable, this Court will decline jurisdiction of this case; conditioned, however, that Respondents shall, within fifteen (15) days from date hereof, deliver to Libelant a good and sufficient bond, in the principal sum of one hundred thousand dollars ($100,000.00), guaranteeing the payment of any final judgment that may be had in favor of Libelant against Respondent's ship, The SS Monrosa, up to and including the sum of one hundred thousand dollars ($100,000.00) as a result of the cause of action made [fol. 33] the basis of this suit. See William H. Muller &

Co. vs. Swedish American Line, Ltd., et al, 224 F. 2d 806, 1955 A.M.C. 1687 (1955), cert. denied 350 U.S. 903, 76 S. Ct. 155, 100 L. Ed. 100, 1955 A.M.C. 2406 (1955).

Said one hundred thousand dollars ($100,000.00) bond to be kept in effect by Respondents until the termination of the controversy involved in this suit.

Clerk will notify counsel.

(s) Allen B. Hannay, United States District Judge.

IN UNITED STATES DISTRICT COURT

RESPONDENT'S BOND—Filed: January 24, 1957

Whereas a libel was filed in this cause on or about April 3, 1956, by Carbon Black Export, Inc., against the SS MONROSA, her engines, tackle, etc. and Navigazione Alta Italia, for the reasons and causes in said libel mentioned, and a claim has been filed by Navigazione Alta Italia, a corporation, to said vessel, and

Whereas, by memorandum dated December 31, 1956, this Court has declined jurisdiction of this case because it had [fol. 34] not been shown that the agreement between Libellant and Respondents to sue or be sued only in the Courts of Genoa, Italy, is unreasonable, conditioned, however, upon Respondents delivering to Libellant a good and sufficient bond in the principal sum of One Hundred Thousand ($100,000.00) Dollars, guaranteeing the payment of any final judgment that might be rendered in the Courts of Genoa, Italy, in favor of Libellant and/or its successors in name and interest against the Respondent-Claimant's ship, the SS MONROSA, as a result of the alleged cause of action made the basis of this cause, with said bond to be kept in effect by Respondent-Claimant until the termination of the controversy involved in this cause, and

Whereas, the said Respondent-Claimant, Navigazione Alta Italia, and National Surety Corporation its surety, the parties hereto hereby consent and agree, that in case of default or contumacy on the part of said Respondent-Claimant or its surety, execution may issue against their

goods, chattels and lands for the sum of One Hundred Thousand ($100,000.00) Dollars.

Now, Therefore, It Is Hereby Stipulated and Agreed, for the benefit of the Libellant, Carbon Black Export, Inc., and/or its successors in name and interest, that the stipulators undersigned are, and each of them is, bound in the sum of One Hundred Thousand ($100,000.00) Dollars, conditioned that the Respondent-Claimant above named shall abide by and pay the money awarded, if any, including costs of court, by any final judgment that may be rendered in the Courts of Genoa, Italy, in favor of the Libellant above named and/or its successors in name and interest against [fol. 35] the Respondent-Claimant's ship, the SS MONROSA, as a result of the alleged cause of action made the basis of this cause.

Executed in Triplicate Originals, this 23rd day of January, 1957.

Navigazione Alta Italia, (Signed) By E. D. Vickery, Principal, Of Royston & Rayzor, Its Proctors.

National Surety Corporation, (Signed) By Rube Armstrong, Jr., Surety.

(Seal)

Taken and acknowledged as to the Respondent-Claimant this 23rd day of January, 1957.

(Signed) Mrs. Louise Hill, Notary Public in and for Harris County, Texas.

(Seal)

Taken and acknowledged as to the surety this 23 day of January, 1957.

(Signed) Mrs. Louise Hill, Notary Public in and for Harris County, Texas.

(Seal)

[fol. 36] Approved:

Hill, Rivkins, Middleton, Louis & Warburton; Fulbright, Crooker, Freeman, Bates & Jaworski, (Signed) By Carl G. Stearns, Proctors for Libellant.

In United States District Court

Final Decree—January 25, 1957

On the 31st day of December, 1956, came on to be heard the Motion to Decline Jurisdiction of the Respondents herein and the Court having considered said Motion, the affidavits and briefs of proctors for Libellant and Respondents and the Court being of the opinion that it has not been shown that the agreement in the bills of lading between Libellant and Respondents to sue or be sued only in the Courts of Genoa, Italy, is unreasonable, and that it should decline jurisdiction of this cause, conditioned, however, upon Respondent-Claimant delivering to Libellant, within 15 days, good and sufficient bond in the principal sum of $100,000.00, guaranteeing the payment of any final judgment that might be rendered in the Courts of Genoa, Italy, in favor of Libellant and/or its successors in name and interest, against the Respondent-Claimant's ship, the SS MONROSA, as a result of the alleged cause of action made the basis of this cause, with said bond to be kept in effect by Respondent-[fol. 37] Claimant until the termination of the controversy involved in this cause, and it further appearing to the Court that the bond above required has been delivered by Respondent-Claimant to Libellant, now, therefore, it is

Ordered that the Court's Memorandum dated December 31, 1956, heretofore filed by the Court, be, and it hereby is, confirmed and adopted as the Court's Findings of Facts and Conclusions of Law pursuant to Supreme Court Admiralty Rule 46½, and it is further

Ordered, Adjudged and Decreed, that the Motion to Decline Jurisdiction of the Respondents be, and the same hereby is in all respects sustained, and that this cause be and it hereby is, dismissed without prejudice to the right of Libellant and/or its successors in name and interest to assert said cause in the Courts of Genoa, Italy, and it is further

Ordered, Adjudged and Decreed, that all costs of court be borne by Libellant, and it is further

Ordered that the Stipulation to Abide Decree filed herein by the Respondent-Claimant on or about April 9, 1956, be, and it hereby is, cancelled and discharged of record.

Done at Houston, Texas, this 25th day of January, 1957.

(Signed) Allan B. Hannay, United States District Judge.

[fol. 38] Approved as to Form:

Hill, Rivkins, Middleton, Louis & Warburton; Fulbright, Crooker, Freeman, Bates & Jaworski, (Signed) By Carl G. Stearns, Proctors for Libellant.

Royston & Rayzor, (Signed) By E. D. Vickery, Proctors for Respondents.

IN UNITED STATES DISTRICT COURT

LIBELANT'S PETITION FOR APPEAL—Filed: March 26, 1957

The libelant, Carbon Black Export, Inc., believes that the opinion of the District Court, the Findings of Fact, Conclusions of Law, and Final Decree heretofore entered thereon in the above case are erroneous.

Therefore, libelant prays that it may be allowed to appeal from said final decree to the next term of the United States Court of Appeals for the Fifth Circuit.

Dated at Houston, Texas, this 15th day of March, 1957.

[fol. 39] Fulbright, Crooker, Freeman, Bates & Jaworski, (Signed) By: Carl G. Stearns, Proctors for Libelant, Carbon Black Export, Inc., Bank of the Southwest Building, Houston 2, Texas.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—March 26, 1957

It is Ordered that the appeal herein be allowed as prayed for.

Dated this 26th day of March, 1957.

(s) Allen B. Hannay, United States District Judge.

Waiver

Services accepted, receipt of copy acknowledged and further services waived.

Royston & Rayzor, (Signed) By E. D. Vickery, Proctors for Claimant-Respondent, Navigazione Alta Italia.

[fol. 40]

IN UNITED STATES DISTRICT COURT

LIBELANT'S NOTICE OF APPEAL—Filed: March 26, 1957

Sirs:

Please take notice that Carbon Black Export, Inc., the libelant herein, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final decree of this Court entered herein the 25th day of January, 1957, and from each and every part of said decree.

Dated at Houston, Texas, this 15th day of March, 1957.

Fulbright, Crooker, Freeman, Bates & Jaworski, (Signed) By: Carl G. Stearns, Proctors for Libelant, Carbon Black Export, Inc., Bank of the Southwest Building, Houston, Texas.

To: Hon. V. Bailey Thomas, Clerk, Messrs. Royston & Rayzor, 877 San Jacinto Building, Houston, Texas.

[fol. 41] Waiver

Services accepted, receipt of copy acknowledged, and further services waived.

Royston & Rayzor, (Signed) By E. D. Vickery, Proctors for Claimant-Respondent, Navigazione Alta Italia.

* * * * * * *

Bond for Costs on Appeal ommitted from the printed record pursuant to the Joint Request for Printing of Record.

In United States District Court

Assignment of Errors—Filed: March 26, 1957

Carbon Black Export, Inc., hereby assigns error in the proceedings, decision, order, and final decree of the District Court in the above entitled suit, as follows:

1. In finding that the agreement (bills of lading) between libelant and respondents to sue or to be sued only in the courts of Genoa, Italy, was not unreasonable;

2. In holding that the District Court would decline juris-[fol. 42] diction of the above entitled suit on the ground that it had not been shown that the agreement (bills of lading) between libelant and respondents to sue or be sued only in the courts of Genoa, Italy, was not unreasonable;

3. In declining to take jurisdiction in the above entitled suit.

4. In sustaining respondents' motion to decline jurisdiction.

5. In entering a final decree sustaining respondents' motion to decline jurisdiction.

6. In entering a final decree declining jurisdiction.

7. In entering a final decree dismissing the above entitled and numbered cause.

8. In entering the final decree which is entered in the above entitled and numbered cause.

9. In entering a final decree ordering, adjudging and decreeing that all costs of court be borne by the libelant.

10. In ordering that the Stipulation to Abide Decree filed by the respondent-claimant on or about April 9, 1956, be cancelled and discharged of record.

Fulbright, Crooker, Freeman, Bates & Jaworski, [fol. 43] (Signed) By: Carl G. Stearns, Proctors for Carbon Black Export, Inc., Bank of the Southwest Building, Houston 2, Texas.

Waiver

Services accepted, receipt of copy acknowledged and further service waived.

Royston & Rayzor, (Signed) By: E. D. Vickery, Proctors for Claimant-Respondent, Navigazione Alta Italia, 877 San Jacinto Building, Houston 2, Texas.

[fol. 44] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 45] [File endorsement omitted]

[fol. 47]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOLDING SESSIONS AT HOUSTON

No. 1417 Admiralty

CARBON BLACK EXPORT, INC.

versus

S/S "MONROSA", Her Engines, Tackle, Etc., and NAVIGAZIONE ALTA ITALIA

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[fol. 48]

MOTION TO PREPARE SUPPLEMENTAL RECORD AND ORDER GRANTING SAME—Filed: August 29, 1957

Now comes Carbon Black Export, Inc., libelant-appellant, in the above entitled and numbered suit and moves this Court to prepare a supplemental record on appeal and transmit the same to the United States Court of Appeals, Fifth Circuit, which shall include the following:

1. Notice of Appearance of Navigazione Alta Italia filed April 9, 1956;
2. Claim of Owner filed by Navigazione Alta Italia on April 9, 1956;
3. This Motion and Order;
4. District Clerk's Certificate.

Dated at Houston, Texas, August 26, 1957.

Fulbright, Crooker, Freeman, Bates & Jaworski, (Signed) By Carl G. Stearns, Proctors for Libelant-Appellant, Carbon Black Export, Inc.

[fol. 49] So Ordered at Houston, Texas, August 28, 1957.

/s/ T. M. Kennerly, United States District Judge.

We consent to the entry of the above Order without further notice.

Royston & Rayzor, (Signed) By E. D. Vickery, Proctors for Claimant-Respondent-Appellee, Navigazione Alta Italia.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEARANCE—Filed: April 9, 1956

Please take notice that the Respondent, Navigazione Alta Italia, hereby appears in the above entitled cause and that we are retained as proctors for the Respondent herein.

Royston & Rayzor, (Signed) By E. D. Vickery, 877 San Jacinto Building, Houston 2, Texas, Proctors for Respondent.

[fol. 50]

IN UNITED STATES DISTRICT COURT

CLAIM OF ORDER—Filed: April 9, 1956

And now appears Navigazione Alta Italia, for the interest of itself as owner of the SS MONROSA, her engines, etc., before this Honorable Court, and makes claim to the said SS MONROSA as the same is proceeded against at the instance of Carbon Black Export, Inc., and the said claimant, Navigazione Alta Italia, avers that it was at the time of the filing of the libel herein, and still is, the true and bona fide owner of the said SS MONROSA, her engines, etc.; wherefore, it prays to defend accordingly.

Navigazione Alta Italia, (Signed) By E. D. Vickery, Of Royston & Rayzor, 877 San Jacinto Building, Houston 2, Texas, Proctors for Claimant.

Duly sworn to by E. D. Vickery jurat omitted in printing.

[fol. 52] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 53]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—December 2, 1957 (omitted in printing)

[fol. 54]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16667

CARBON BLACK EXPORT, INC., Appellant,

versus

SS MONROSA, Her Engines, Tackle, Etc., and NAVIGAZIONE ALTA ITALIA, Appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before BORAH, TUTTLE and CAMERON, Circuit Judges.

CAMERON, Circuit Judge: This appeal presents the question whether the court below correctly declined jurisdiction (on the ground that the bills of lading vested exclusive jurisdiction in Italian Courts) of a libel for damages to and nondelivery of cargo, brought by an American citizen against the ship upon which the cargo was loaded and [fol. 55] against the owner of the ship. In December, 1955, the libelant, Carbon Black Export, Inc., a manufacturer an (sic) exporter of carbon black, delivered to, and shipped on board, the SS MONROSA at Houston Texas and New Orleans, Louisiana about 30,000 bags of carbon black. The shipments to three Italian ports were covered by twenty-seven bills of lading, all on the same printed form.

Upon arrival of the MONROSA at the first Italian port, a portion of the shipment was delivered in damaged condition, and that destined for the other two Italian ports was never delivered at all. Libelant claimed damages in the sum of $110,000.00.

The libel was filed in the court below upon the return, some three months later, of the MONROSA to Houston, Texas and prayed that process issue against the MONROSA, her engines, tackle, etc., and that all persons claiming any right, title or interest in the steamship be cited to appear and that the steamship be condemned and sold to pay libelant's demands. Besides the *in rem* action against the MONROSA, Navigazione Alta Italia, the owner of the vessel, was made a respondent.

Six days after the filing of the libel respondent Navigazione filed a "Stipulation to Abide Decree," reciting that the *in rem* proceeding had been brought against the SS MONROSA and that Navigazione had filed a claim[1] to the

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[1] The verified claim, filed on the same date, is in these words:

"CLAIM OF ORDER

"And now appears NAVIGAZIONE ALTA ITALIA, for the interest of itself as owner of the SS MONROSA, her engines, etc., before this Honorable Court, and makes claim to the said SS MONROSA as the same is proceeded against at the instance of CARBON BLACK EXPORT, INC., and the said claimant, NAVIGAZIONE ALTA ITALIA, avers that it was at the time of the filing of the

[fol. 56] vessel, and including this language: ". . . the parties hereto hereby consenting and agreeing, that in case of default or contumacy on the part of said claimant or its surety, execution may issue against their goods, chattels and land for the sum of $100,000.00." This stipulation, on which National Surety Corporation was surety, was conditioned "that the claimant above named shall abide by and pay the money awarded, including costs of court, by the final decree rendered in the cause by this court, or in case of an appeal by the appellate court."

About three months thereafter respondent Navigazione filed a motion praying that the court below decline jurisdiction of the cause based upon the terms of the bills of lading, chiefly the following provision:

> "Clause 27—Also, that no legal proceedings may be brought against the Captain or ship owners or their agents in respect to any loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, notwithstanding that the ship may be legally represented there."

The motion set up grounds which respondents contended established the reasonableness of this provision. Affidavits were thereupon filed by one of the proctors for libelant [fol. 57] opposing the motion, and one of the proctors for respondents favoring it. The facts upon which the court below acted were set forth in the motion and the two affidavits.

The District Court filed a memorandum opinion[2] and entered a final decree reciting that it was "of the opinion

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libel herein, and still is, the true and bona fide owner of the said SS MONROSA, her engines, etc.; wherefore, it prays to defend accordingly."

[2] "Since the agreement (bills of lading) between Libelant and Respondents to sue or be sued only in the Courts of Genoa, Italy, and because it is not shown that said agreement is unreasonable, this Court will decline jurisdiction of this case; conditioned, however, that Respondents shall, within fifteen (15) days from date

that it has not been shown that the agreement in the bills of lading between Libellant and Respondents to sue or be sued only in the Courts of Genoa, Italy, is unreasonable," and granting the motion of respondents to decline jurisdiction and canceling and discharging the stipulation to abide decree filed by the respondent-claimant. Libelant appeals, setting forth its grounds in detail;[3] and respon- [fol. 58] dents point to the motion to decline jurisdiction filed by Navigazione, and the affidavit of its proctor filed as representative of the "Respondents" as spelling out their contentions that the action of the court below was correct.[4]

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hereof, deliver to Libelant a good and sufficient bond, in the principal sum of one hundred thousand dollars ($100,000.00) guaranteeing the payment of any final judgment that may be had in favor of Libelant against Respondent's ship, The SS Monrosa, . . . See William H. Muller & Co. vs. Swedish American Lines, Ltd., et al., 224 F.2d 806, 1955, . . . Cert. den. 350 U.S. 903 . . ."

[3] That it was a citizen of the United States; that respondent Navigazione operated a fleet of cargo ships between Houston and other Gulf ports and Italian and other Mediterranean ports and maintained regularly scheduled service between them; that the MONROSA was in port at Houston from April 7th to April 10th, 1956; that the bills of lading were printed in English; that a general appearance had been entered on behalf of respondents constituting a waiver of the claim against the court's jurisdiction; that Clause 27 of the bill of lading did not bar suit *in rem* against the MONROSA; that the bills of lading provided that the Carriage of Goods by Sea Act of the United States would form a part of the bills of lading and the United States Courts were in the best position to apply them; that libelant had the choice of forum and its choice should be respected; that the bills of lading were issued in the United States and partly performed here; that testimony of the condition of the carbon black when loaded and of the MONROSA at the time of loading was available only in the United States; and that it had endeavored to take the depositions of the MONROSA's crew while it was docked at Houston, but that such effort had been arrested by the court below at the instance of respondents; and that under the circumstances Clause 27 was illegal and that it had no application under the facts set forth.

[4] That the bills of lading provided that they were governed by the law of the steamer and the regulations of the Italian Commercial Code; that the vessel was owned by a Genoese corporation and its witnesses were Italians residing in Italy with no expectation of being in the United States at the time of trial; that the damage

We agree with libelant that the court below was in error in granting the motion to deny jurisdiction under the facts of this case. Particularly is this true with respect to the proceeding *in rem* against the ship itself. As to this feature of the case, the decision of the Second Circuit in *Muller*[5] [fol. 59] has no application. The ship there involved had been lost at sea and there was no *in rem* action. The clause of the bill of lading there involved[6] is broader than that in the case before us. The language there encompassed "any claim against the carrier arising under the bill of lading," while the language of the exclusionary clause here was confined to legal proceedings brought against the Captain or ship owners or their agents. There is nothing in Clause 27 which has any tendency to establish that the parties intended that it should be made applicable to an *in rem* proceeding against the ship itself.

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to the cargo was surveyed upon arrival at Genoa and the witnesses with respect to such damage were located there; that the market value of the cargo should be determined as of the market price at the port of destination; that the seaworthiness of the vessel before and during the voyage could be proved only by Italian witnesses; that the captain of the MONROSA had suffered a heart attack and was no longer aboard the vessel; that all of the cargo was discharged at Genoa, the remainder being damaged to such an extent that it could not be delivered to the other Italian ports, and the witnesses having knowledge thereof were situated in Genoa; that Italy has been a maritime nation for centuries and its courts were familiar with the U. S. Carriage of Goods by Sea Act and were capable of giving effect to it; and that because of the provisions of the bill of lading and also under the doctrine of forum non conveniens, the court below correctly declined jurisdiction.

[5] 224 F.2d 806, cert. den. 350 U.S. 903. Neither did the other two cases from the same Circuit so heavily relied upon by appellees, the Bio Bio case, 227 F.2d 519, and the Geisha case, 187 F.2d 990, involve actions *in rem*. Appellees cite no authority wherein an exclusionary clause similar to that here involved has been held to apply to an action *in rem*.

[6] "Jurisdiction. Any claim against the carrier arising under this bill of lading shall be decided according to Swedish law, except as provided elsewhere herein, and in the Swedish courts, to the jurisdiction of which the carrier submits himself."

What we said recently in *Motor Distributors, Ltd. et al* v. *Olaf Pedersen's Rederi*[7] is persuasive here, although we were considering the general question of whether justice would be better subserved by retaining or declining jurisdiction rather than the terms of an exclusionary clause:

> "Moreover, something deeply significant in the whole field of maritime law is here at stake. With respect to ocean-going carriers it seems that one of the most universally recognized rules of law is that which gives the right to libelant, possessing a maritime lien against [fol. 60] a vessel, to proceed in rem in the jurisdiction where the vessel is found."

Finding no authorities to the contrary, and feeling that the exclusionary clause relied on by respondents does not in terms apply to *in rem* proceedings, we hold that the court below was in error when it granted the motion to decline jurisdiction of the *in rem* feature of the libel.[8]

We are of the opinion also that the court below should have denied the motion of respondent Navigazione to decline personal jurisdiction as to it. In essence, the motion was based upon Clause 27 as buttressed by the doctrine of forum non conveniens. Any consideration of such a question starts with the universally accepted rule that agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced.[9]

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[7] 1957, 239 F.2d 463, 467.

[8] It is of no importance that respondent Navigazione posted a bond to release the MONROSA. With respect to that action appellees say in their brief: ". . . in order to preserve the security which appellant had acquired by its seizure of the vessel . . . , the court conditioned its order on delivery by appellees to appellant of a good and sufficient bond . . ."

[9] The rule is thus epitomized in the headnote of the article on Contracts, 17 C.J.S. §229, page 603: "Contract provisions intended to oust courts of their jurisdiction in advance, as distinguished from provisions merely imposing conditions on the exercise of the right to sue, are void. This rule has been frequently considered in determining the validity of contracts as to venue, periods of limitation, notice or demand, and evidence." *(Continued)*

[fol. 61] We do not find it necessary to espouse or reject the position taken by the Court of Appeals of the Second Circuit in the cases mentioned above, which are relied upon as marking a departure from this general rule.[10] The facts before that Court in those cases were, in each instance, materially different from those before us. In addition to those already discussed, it is important to note that the contracts of carriage here were made in the United States and were partially performed here, that the bills of lading specifically adopted the Carriage of Goods by Sea Act of the United States as part of their provisions and were printed in English, tending to indicate that the parties recognized that the courts of the United States were in a good position to pass upon the rights of the parties to them. It is further noteworthy that the testimony of the crew of the MONROSA was sought by libelant and resisted by respondent when the crew were in Houston; and, finally respondents invoked the jursdiction of the court below in general terms and rested upon this action several months before challenging that jurisdiction by its motion.

[fol. 62] As heretofore pointed out, respondents pitch their argument to a considerable extent upon the doctrine

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And see also 14 Am. Jur., Courts, §196, pp. 389-390, which thus summarizes the rule: "Both in England and the United States it has been decided in a great number of cases, and conceded in an equally large number of other cases, to be settled law that the jurisdiction of the courts cannot be ousted by the private agreement of individuals made in advance, that private persons are incompetent to make any such binding contracts, and that all such contracts are illegal and void as against public policy."

Cited to both texts are a number of decisions of the Supreme Court of the United States; and cf. our decision in Burt v. Isthmus Development Co., 1955, 218 F.2d 353, 356, cert. den. 349 U.S. 922.

[10] Those cases do not purport to construe such a provision as Clause 27 as creating an absolute right but one to be accorded if all of the facts of a given case make it reasonable to give it effect. Several District Courts have considered the cases and have refused to decline jurisdiction despite the presence of similar clauses, e.g., Chemical Carriers, Inc. v. L. Smit & Company's etc., S.D. N.Y., 1957, 1954 F. Supp. 886; Sociedade Brasileira etc. v. S. S. Punta Del Este, etc., D. of N.J., 1955, 135 F. Supp. 394; and St. Paul Fire & Marine Ins. Co. v. The Republica de Venezeula et al., S.D. N.Y., 1952, 105 F. Supp. 272.

of forum non conveniens, recognizing that Clause 27 alone did not provide a firm basis upon which to stand. The rule governing application of that doctrine is thus expressed by the Supreme Court in *Gulf Oil Corp.* v. *Gilbert*, 1946, 330 U.S. 501, 508, "But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."

The judgment of the court below granting the motion to decline jurisdiction and vacating and discharging the stipulation to abide the decree of the court below is reversed and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

[fol. 63]

IN UNITED STATES COURT OF APPEALS

CARBON BLACK EXPORT, INC.,

No. 16667. versus

SS MONROSA, Her Engines, Tackle, Etc., and NAVIGAZIONE ALTA ITALIA.

JUDGMENT—April 18, 1958

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court granting the motion to decline jurisdiction and vacating and discharging the stipulation to abide the decree of said court, in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellees, SS Monrosa, Her Engines, Tackle, Etc., and

Navigazione Alta Italia, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

[fol. 64] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 65]

SUPREME COURT OF THE UNITED STATES

No. 178, October Term, 1958

"SS MONROSA", her Engines, Tackle, etc., and NAVIGAZIONE ALTA ITALIA, Petitioners,

vs.

CARBON BLACK EXPORT, INC.

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.

FILED
JUL 16 1950
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No. 1784

IN THE

Supreme Court of the United States

October Term, 1949

SS MONTROSA, HER ENGINES, TACKLE, ETC., AND NAVIGAZIONE ALTA ITALIA, *Petitioners*

vs.

CARBON BLACK EXPORT, INC., *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
for the Fifth Circuit

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No._____

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SS MONROSA, HER ENGINES, TACKLE, ETC., AND NAVIGAZIONE ALTA ITALIA, *Petitioners*

-VERSUS-

CARBON BLACK EXPORT, INC., *Respondent*

PETITION FOR WRIT OF CERTIORARI To The United States Court of Appeals for the Fifth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment in the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on April 18, 1958.

Citations to Opinions Below

The memorandum opinion of the United States District Judge is unreported and appears at R. 32-33. The opinion of the Court of Appeals for the Fifth Circuit printed in Appendix "A" hereto, infra, p. 15, (R. 54-62) is reported in 254 F. 2d 297 (1958).

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 18, 1958. R. 63; p. 24, infra. The jurisdiction of this Court is invoked under 28 *U.S.C.*, Sec. 1254(1).

Questions Presented

Is a clause in a foreign shipowner's bill of lading in which Respondent (cargo owner) and Petitioner (vessel owner) agreed to adjudicate claims for damage to cargo in the courts of Genoa, Italy, a valid and enforceable agreement?

If such an agreement is valid, did the agreement of Respondent and Petitioner here include *in rem* actions against the vessel itself?

Statement

Invoking the admiralty and maritime jurisdiction of the United States, Respondent, Carbon Black Export, Inc., filed its original libel (R. 4-11), alleging the issuance of bills of lading by the Petitioner, covering a cargo of carbon black loaded at Houston, Texas, and New Orleans, Louisiana, in December, 1955, aboard the SS MONROSA, a vessel owned and operated by the Petitioner, and flying the Italian flag. This cargo was to be transported to the Italian ports of Genoa, Naples, Venice and Trieste. These bills of lading constituted the contract for carriage of this carbon black between Petitioner and Respondent. The cargo was damaged upon its arrival in Genoa, Italy, where it was discharged.

The libel (R. 4-11) both *in rem* against the MONROSA and *in personam* against Petitioner, prayed for damages

allegedly sustained by the Respondent by virtue of the damage to the cargo in the amount of $110,000.

To obtain security for its claim, Respondent had a warrant of seizure issued against the SS MONROSA at Houston, Texas, in connection with the *in rem* portion of the libel, and to obtain release of its vessel Petitioner filed a Stipulation to Abide Decree (R. 12) on April 9, 1956, and as is customary in admiralty matters, Petitioner likewise on the same day filed its Notice of Appearance (R. 49) and Claim of Owner (R. 50), incorrectly designated in the certified transcript of record as Claim of "Order".

The bill of lading (R. 20), the contract between the parties, contained certain express agreements embodied in Clauses 27, 28, 29 and 32 thereof,[1] that no legal proceedings

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[1] "Clause 27—Also, that no legal proceedings may be brought against the Captain or ship owners or their agents in respect to any loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, notwithstanding that the ship may be legally represented there."

"Clause 28—Also, that this contract is governed by the law of the steamer, carrying the goods, but any average that may arise on the voyage to be adjusted according to conditions named on the reverse side."

"Clause 29—Also, that in regard to all and everything which is not regulated and provided for in the present contract of transport, the regulation of the Italian Commercial Code will be in vigour."

"Clause 32—This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such terms shall be void to that extent, but no further."

for loss or damage to the cargo would be brought by Respondent except in Genoa, Italy. Petitioner, in its Motion to Decline Jurisdiction (R. 14-20), while recognizing and acknowledging the jurisdiction of the United States District Court, moved the court to exercise its jurisdiction by granting specific performance of the agreement in the bills of lading to adjudicate the Respondent's damage claim in Genoa, Italy.

On July 27, 1956, Petitioner (Respondent in the admiralty action in the District Court) filed its Motion to Decline Jurisdiction (R. 14-20), and attached as part of its Motion to Decline Jurisdiction a photostatic copy of Bill of Lading No. 7 (R. 20), covering twenty-five bags of the cargo of carbon black loaded on the MONROSA at Houston for delivery to Genoa, Italy. A total of twenty-seven bills of lading were issued, as the libel (R. 4-11) alleges, and all of the printed terms thereon are identical to Bill of Lading No. 7 (R. 20).

The Respondent, Libellant below, filed the Affidavit of Carl G. Stearns in opposition to the Motion to Decline Jurisdiction (R. 21-28) on September 21, 1956.

In support of its Motion to Decline Jurisdiction (R. 14-20), Petitioner filed on October 2, 1956, the Affidavit of E. D. Vickery in support of the Motion to Decline Jurisdiction (R. 29-32).

The District Court granted the Motion to Decline Jurisdiction and filed its Memorandum Opinion on December 31, 1956, (R. 32) on the ground that the agreement to adjudicate cargo claims only in Genoa was not shown to be an unreasonable one. The District Court relied on the decision of the United States Court of Appeals for the

Second Circuit in *William H. Muller & Co. v. Swedish American Line, Ltd., et al.*, 224 F. 2d 806 (2 C.A.), cert. denied 350 U.S. 903 (1955). However, in order to preserve the security which Respondent had acquired by its seizure of the vessel and the posting by Petitioner of a release bond (R. 12) with surety in the amount of $100,000, the court conditioned its order sustaining the Motion to Decline Jurisdiction on delivery by Petitioner to Respondent of a good and sufficient bond in the same principal sum guaranteeing the payment of any final judgment that might be had in favor of Respondent against Petitioner's ship, the SS MONROSA, and further requiring that said bond be kept in effect by Petitioner until termination of the controversy involved in this suit. Such bond was executed, approved by Respondent's proctors, and timely filed and delivered (R. 33-36).

While the Motion was being considered by the District Court, Petitioner granted Respondent an extension of time in which to sue in Italy, since limitations was about to run. Subsequent to the District Court's decision in this action a suit has actually been filed by Respondent against Petitioner and its vessel in Genoa, Italy for this same cargo damage.

Upon appeal, the United States Court of Appeals for the Fifth Circuit reversed and remanded this cause to the District Court. The Court of Appeals based its reversal on two grounds:

1. That the agreement to adjudicate claims in Genoa was void because contrary to public policy, and

2. That the agreement did not include *in rem* actions against the vessel itself as well as *in personam* actions against Petitioner.

Reasons for Granting the Writ

1. The holding of the Court of Appeals that the agreement to adjudicate claims for cargo damage in Genoa is not enforceable because contrary to public policy is directly in conflict with three decisions of the United States Court of Appeals for the Second Circuit:

William H. Muller & Co. v. Swedish American Line, Ltd., et al., 224 F. 2d 806 (2 C.A.), cert. denied 350 U.S. 903 (1955);

The Geisha-Cerro De Pasco Copper Corp. v. Knut Knutsen, O.A.S., 187 F. 2d 990 (2 C.A., 1951);

Murillo, Ltd., et al. v. The Bio Bio, et al., 227 F. 2d 519 (2 C.A., 1955), aff. 127 F. Supp. 13 (S.D. N.Y. 1955).

In these three decisions, the Court of Appeals for the Second Circuit recognized that agreements such as the one involved in this case had been criticized and attacked as being contrary to public policy, but this argument was expressly rejected in these three cases by the Court of Appeals for the Second Circuit. In so doing, the Court of Appeals for the Second Circuit held that such agreements are invalid only when unreasonable and that the enforceability of any such agreement depends upon its reasonableness.

While really basing its decision on its view that such agreements are contrary to public policy, the Court of Appeals for the Fifth Circuit attempts to avoid the direct holdings by the Court of Appeals for the Second Circuit to the contrary, by simply stating that the facts before the Court of Appeals for the Second Circuit in these three cases were materially different from those of the present case. Obviously, as is true in all cases, there are

some factual differences but a comparison of the factors which led the Court of Appeals for the Second Circuit to enforce the agreements in its three cases with the factors involved in this case demonstrates clearly that the factors involved here are substantially the same. A comparison of the decisions in the three cases from the Court of Appeals for the Second Circuit with the facts of this case which indicate that the only reasonable forum for the adjudication of this controversy is a Court in Genoa, demonstrates conclusively that had this matter been presented to the Court of Appeals for the Second Circuit for decision, the agreement would have been enforced or the Court of Appeals for the Second Circuit would have had to overrule its three previous decisions. The distinguishing factors advanced by the Court of Appeals for the Fifth Circuit in an attempt to distinguish this case from these three decisions of the Court of Appeals for the Second Circuit pale into insignificance when the factors indicating the reasonableness of the present agreement are considered.[2]

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[2] These factors are:

1. The vessel is owned by a Genoese corporation and its operations are directed therefrom. All records of the corporation relating to the vessel and its cargo are located there.

2. The vessel's crew are Italians, residing in Italy, and as possible witnesses, have no expectation of being in the United States at the time of trial. Since the voyage referred to in the Libel, the Captain of the vessel, patently an indispensable witness, has suffered a heart attack and is no longer aboard the vessel. No information is available in the record as to the whereabouts of other crew members or even whether they are still in the employ of Petitioner. Employment as a member of the crew of a vessel is characteristically transitory in nature, and certainly it is only the rankest kind of speculation to say that one or any of the MONROSA's foreign crew were aboard at the times mentioned and certainly it cannot be expected that they would be present at the time of trial in the United States where their

2. The holding of the Court of Appeals for the Fifth Circuit that the agreement in the bills of lading (R. 20),

oral and obviously more effective testimony could be obtained. This is true notwithstanding the fact that the MONROSA and other of the Petitioner's ships on occasions call at Gulf ports with crews aboard. At any rate, the MONROSA's crew is Italian and it resides in Italy and the obvious benefit of this factor and the probability that they would be available at the time of trial in Genoa is apparent. Certainly, their presence would be more desirable to a court than deposition testimony.

The fact that deposition testimony could have been obtained from the MONROSA's crew in April or in September of 1956 (assuming the personnel other than the Master was the same) should not influence the decision in this case, since the District Court ruled that Respondent who served notice for the taking of depositions two days after the filing of the Libel with no advance notice was not entitled to this deposition testimony when it was sought. In this connection, the District Court ruled after hearing oral argument that the notices to take depositions had to be vacated; first, because discovery depositions are not authorized in admiralty, and second, because depositions **de bene esse** cannot be taken before issue is joined. The Libel had been filed only two days before the notices of depositions were served and no responsive pleading was due for more than nine days after the depositions had been noticed. In any event, it would have been quite unjust to permit the depositions when Petitioner's counsel did not have, and could not obtain from Italy, full information on the facts of the case before the depositions were scheduled.

It is entirely possible that Respondent was not primarily concerned with obtaining the testimony of these witnesses on the merits of the claim, but, on the contrary, to attempt to bolster its contentions in opposition to Petitioner's motion to decline jurisdiction in an effort to avoid the agreement it had previously made to adjudicate claims in Genoa, Italy.

3. Of the four Italian ports listed where the carbon black was destined, Genoa was the first port reached by the SS MONROSA and it was there that all of the cargo that was capable of being delivered was discharged, the remainder being damaged to such an extent that it could not be delivered to the other Italian ports. Therefore, it was at Genoa, the place agreed upon for the adjudication of any cargo damage claims in the bills of lading,

and particularly Clause 27 thereof (R. 56; infra, p. 11) did not include libels *in rem* against the vessel, is directly

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where the cargo was discharged and surveyed, the damages segregated and the condition of the cargo noted, not only by Petitioner's representatives but by Respondent's representatives as well.

4. Clause 8 of the bills of lading provides that in the event of claims for short delivery and damage, the value of the cargo shall be determined as of its market value at the port of destination on the day of the vessel's arrival in the Italian port (Genoa). Accordingly, testimony as to the market value will have to be obtained exclusively in Genoa, Italy. This measure of damages (the value of the cargo at the port of destination on the date of its arrival) is the same measure as applied in courts of admiralty in the United States.

5. The Libel alleges damages to the cargo by seawater. Accordingly, the seaworthiness of the vessel before, at the beginning of, and during the course of the voyage will be one of the main issues in this case. All repairs and surveys of the vessel, both before the voyage in question and following its completion, were performed in Italy, and therefore all evidence and testimony regarding the inspections, repairs and seaworthiness in general will be available to the Italian Court in Italy, and not here. Testimony respecting the seaworthiness of the hull of the SS MONROSA when it departed Houston and New Orleans is primarily obtainable from Italian surveyors and from the crew of the SS MONROSA, since no complete hull surveys of the MONROSA's cargo holds were made by American surveyors at Houston and New Orleans prior to the vessel's departure on the voyage in question.

Petitioner has the burden of showing that it used due diligence to make the vessel seaworthy when the cargo was loaded in Houston and New Orleans, but while there may be some testimony on this issue available in Houston and New Orleans, the vast majority of it will have to come from the ship's crew, from the vessel's records in Italy and from Italian surveyors who had made periodic checks of the vessel's hull prior to this voyage and subsequent thereto.

6. General Average has been declared in Italy and all computations required in the adjudication thereof is being accomplished in Italy. Whether this is a general average situation or not is a matter that also must be resolved possibly by litigation in Italy.

contrary to the decision of the United States Court of Appeals for the Second Circuit in *Murillo, Ltd., et al. v. The Bio Bio, et al.*, 227 F. 2d 519 (2 C.A., 1955), affirming 127 F. Supp. 13 (S.D. N.Y., 1955).

While as the court below points out the *Muller* case[3] did not involve a libel *in rem* because the vessel was lost at sea, the even later decision of the Court of Appeals for the Second Circuit in *The Bio Bio* case involved both a proceeding *in rem* against three vessels and *in personam* against their owners. The agreement in *The Bio Bio* case referred solely to claims against the "carrier" and provided that suits against the carrier could be brought only in the courts of the City of Stockholm, Sweden. A comparison of the agreement in the present case with the agreement in *The Bio Bio* case indicates clearly both clauses were intended to cover legal proceedings of any kind in connection with cargo damage.[4]

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7. Respondent did not have to accept the agreement to adjudicate the claims in Genoa because of economic duress because Lykes Bros. Steamship Co., Inc., among other United States steamship lines, maintains regular services to these same Italian ports with vessels sailing from the Gulf to such ports each two weeks. (R. 30-31). Thus, had Respondent objected to the agreement in the Petitioner's bills of lading, its shipment could have been made on an American vessel whose bills of lading do not contain such clauses agreeing upon a foreign forum for litigation of disputes arising out of damage to the cargo. In these days of substantial subsidies to American steamship lines, it would seem desirable to help them meet foreign competition by encouraging American citizens to use American ships and thus avoid having to file damage claims in foreign countries while at the same time bolstering our American Merchant Marine.

[3] 224 F. 2d 806 (2 C.A.), cert. denied 350 U.S. 903 (1955).

[4] In **The Bio Bio** case the agreement was:

> "Any claims in connection with the goods carried under the bill of lading must be filed against the carrier in the City of Stockholm and settled according to Swedish law. . ."

Clearly the term carrier used in *The Bio Bio* case is a reference to the company owning the vessel and by definition, a carrier is, "A person or corporation undertaking to transport persons or property from place to place, by means of conveyance, either gratuitously or for hire . . ."[5] Nevertheless, in *The Bio Bio* case the Court of Appeals for the Second Circuit upheld the District Court's declination of jurisdiction of both the *in rem* and *in personam* actions brought in other than the agreed upon forum upon a showing that the agreement was not unreasonable, whereas, and in direct conflict with *The Bio Bio* case, the Court below, although announcing they were unable to find authority to the contrary, reversed the District Court's declination of the *in rem* feature of the libel.

3. The decision of the court below refusing to uphold the agreement of the parties both *in rem* and *in personam*, of necessity divorces entirely one form of proceeding from the other, and in so doing is contrary to the decision of the Court of Appeals for the Third Circuit in *Smith v. The MORMACDALE*, 198 F. 2d 849 (3 C.A., 1952),

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Clause 27 of the bill of lading involved here provided as follows:

"Also, that **no legal proceedings may be brought** against the Captain or shipowners or their agents in respect to loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other tribunal in the place or places where the goods are shipped or landed is incompetent, **notwithstanding that the ship may be legally represented there.**" (Emphasis supplied).

[5] **Black's Law Dictionary** (3rd Ed. 1933)

to a decision of the Court of Appeals for the Second Circuit in *Bennett v. SS Mormacteal, et al.*, 254 Fed. 2d 138 (2 C.A. 1958), affirming per curiam, 160 Fed. Suppl. 840 (E.D. N.Y., 1958) (petition for writ of certiorari filed June 11, 1958, No. 1063), and to an earlier decision of its own in *Samuels v. Munson Steamship Line*, 63 F. 2d 861 (1933).[6]

The decision of the court below in separating the *in rem* and *in personam* nature of relief permits the Respondent to avoid its clear contractual agreement with respect to *in personam* actions under the guise of an independent *in rem* proceeding which thereby abrogates completely the effects of its contractual agreement to adjudicate any claims for cargo damage in Genoa, Italy.

4. The question presented is not only one of tremendous national importance but of wide international concern to shippers and receivers of goods of all kinds and to ocean carriers trading to the United States, since almost all foreign shipowners' and operators' bills of lading contain agreements to adjudicate claims in the country of the vessel's flag similar to the agreement in this case. Clearly,

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[6] In these cases, longshoremen had filed actions **in rem** against the vessel only in an attempt to recover compensatory damages from the vessel **in rem**, when they could not recover such damages against the vessel owner **in personam** because the longshoremen were relegated to their rights under the Longshoremen's & Harbor Workers' Compensation Act against their employer, the vessel owner. In these cases, it is held that an action **in rem** against the vessel cannot be maintained since the vessel is not such a separate and independent person from the vessel owner as to make it a legal entity against which the longshoremen's claims can be asserted, because this would permit the longshoremen to recover indirectly compensatory damages from their employer, the vessel owner, when they could not recover them directly from their employer in an **in personam** action.

it can be anticipated since the decisions of the Court of Appeals for the Second Circuit, that foreign shipowners relying on such agreements will, whenever a balance of convenience for litigation in the agreed upon forum appears in their favor, assert such agreements entered into with the cargo shippers or receivers upon the filing of libels against them in the United States. As this Court has never passed directly on the enforceability of such agreements and because of their national and international importance the questions presented should be settled by this Court.

The far reaching importance of the question presented is evident from the proceedings of the Maritime Law Association of the United States which has formed a special committee from its membership to consider the decisions of the Court of Appeals for the Second Circuit regarding jurisdiction and forum, specifically the *Muller (The Oklahoma)* case and the *Murillo, Ltd. (The Bio Bio)* decision. As Appendices B, C and D, there is attached hereto the proceedings of this Committee of the Maritime Law Association of the United States before the membership of the Association in its Documents Nos. 403, 409 and 414 at the Association's fall meeting on November 9, 1956, the full Committee report dated October 29, 1957, and the proceedings in the fall meeting of November 8, 1957, respectively. In Appendix B, infra, p. 25, from Document No. 403, there is a specific reference to the then pending decision of the court below.

These documents strikingly reflect not only the importance of these questions to the Admiralty Bar of this country, but the almost equally divided views of the Admiralty Bar on them. An authoritative decision from this Court is needed to settle these differences.

5. While recognizing the distinction between agreements such as are involved herein, clearly contractual, and the non-contractual doctrine of *forum non conveniens*, there can be no question but what the enforceability of such agreements generally is based, for its particular showing of reasonableness, on a showing similar to that needed to effectively invoke the doctrine of *forum non conveniens*. Therefore, in this respect the exercise of this Court's power of supervision over such a Federal jurisdictional and procedural issue so akin to the doctrine of *forum non conveniens* is highly desirable.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

E. D. VICKERY,
Counsel for Petitioner

July ——, 1958

APPENDIX A

In The

United States Court of Appeals

For The Fifth Circuit

No. 16667

CARBON BLACK EXPORT, INC.,
Appellant,

versus

SS MONROSA, Her Engines, Tackle, Etc., and NAVIGAZIONE ALTA ITALIA,
Appellees.

Appeal from the United States District Court for the Southern District of Texas.

(April 18, 1958.)

Before BORAH, TUTTLE and CAMERON, Circuit Judges.

CAMERON, Circuit Judge: This appeal presents the question whether the court below correctly declined jurisdiction (on the ground that the bills of lading vested exclusive jurisdiction in Italian Courts) of a libel for damages to and nondelivery of cargo, brought by an American citizen against the ship upon which the cargo

was loaded and against the owner of the ship. In December, 1955, the libelant, Carbon Black Export, Inc., a manufacturer an exporter of carbon black, delivered to, and shipped on board, the SS MONROSA at Houston, Texas and New Orleans, Louisiana about 30,000 bags of carbon black. The shipments to three Italian ports were covered by twenty-seven bills of lading, all on the same printed form.

Upon arrival of the MONROSA at the first Italian port, a portion of the shipment was delivered in damaged condition, and that destined for the other two Italian ports was never delivered at all. Libelant claimed damages in the sum of $110,000.00.

The libel was filed in the court below upon the return, some three months later, of the MONROSA to Houston, Texas and prayed that process issue against the MONROSA, her engines, tackle, etc., and that all persons claiming any right, title or interest in the steamship be cited to appear and that the steamship be condemned and sold to pay libelant's demands. Besides the *in rem* action against the MONROSA, Navigazione Alta Italia, the owner of the vessel, was made a respondent.

Six days after the filing of the libel respondent Navigazione filed a "Stipulation to Abide Decree," reciting that the *in rem* proceeding had been brought against the SS MONROSA and that Navigazione had filed a claim[1]

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1 The verified claim, filed on the same date, is in these words:

" CLAIM OF ORDER

"And now appears NAVIGAZIONE ALTA ITALIA, for the interest of itself as owner of the SS MONROSA, her

to the vessel, and including this language: ". . . . the parties hereto hereby consenting and agreeing, that in case of default or contumacy on the part of said claimant or its surety, execution may issue against their goods, chattels and land for the sum of $100,000.00." This stipulation, on which National Surety Corporation was surety, was conditioned "that the claimant above named shall abide by and pay the money awarded, including costs of court, by the final decree rendered in the cause by this court, or in case of an appeal by the appellate court."

About three months thereafter respondent Navigazione filed a motion praying that the court below decline jurisdiction of the cause based upon the terms of the bills of lading, chiefly the following provision:

> "Clause 27 — Also, that no legal proceedings may be brought against the Captain or ship owners or their agents in respect to any loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, notwithstanding that the ship may be legally represented there."

The motion set up grounds which respondents contended established the reasonableness of this provision. Affidavits were thereupon filed by one of the proctors for libelant

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engines, etc., before this Honorable Court, and makes claim to the said SS MONROSA as the same is proceeded against at the instance of CARBON BLACK EXPORT, INC., and the said claimant, NAVIGAZIONE ALTA ITALIA, avers that it was at the time of the filing of the libel herein, and still is, the true and bona fide owner of the said SS MONROSA, her engines, etc., wherefore, it prays to defend accordingly."

opposing the motion, and one of the proctors for respondents favoring it. The facts upon which the court below acted were set forth in the motion and the two affidavits.

The District Court filed a memorandum opinion[2] and entered a final decree reciting that it was "of the opinion that it has not been shown that the agreement in the bills of lading between Libellant and Respondents to sue or be sued only in the Courts of Geno, Italy, is unreasonable," and granting the motion of respondents to decline jurisdiction and canceling and discharging the stipulation to abide decree filed by the respondent-claimant. Libelant appeals, setting forth its grounds in detail;[3] and respond-

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2 "Since the agreement (bills of lading) between Libelant and Respondents to sue or be sued only in the Courts of Genoa, Italy, and because it is not shown that said agreement is unreasonable, this Court will decline jurisdiction of this case; conditioned, however, that Respondents shall, within fifteen (15) days from date hereof, deliver to Libelant a good and sufficient bond, in the principal sum of one hundred thousand dollars ($100,000.00) guaranteeing the payment of any final judgment that may be had in favor of Libelant against Respondent's ship, The SS Monrosa, . . . See William H. Muller & Co. vs. Swedish American Lines, Ltd., et al, 224 F.2d 806, 1955, . . . Cert. den. 350 U.S. 903 . . ."

3 That it was a citizen of the United States; that respondent Navigazione operated a fleet of cargo ships between Houston and other Gulf ports and Italian and other Mediterranean ports and maintained regularly scheduled service between them; that the MONROSA was in port at Houston from April 7th to April 10th, 1956; that the bills of lading were printed in English; that a general appearance had been entered on behalf of respondents constituting a waiver of the claim against the court's jurisdiction; that Clause 27 of the bill of lading did not bar suit **in rem** against the MONROSA; that the bills of lading provided that the Carriage of Goods by Sea Act of the United States would form a part of the bills of lading and the United States Courts were in the best position to apply them; that libelant had the choice of forum and its choice should be respected; that the bills of lading were issued in the United

ents point to the motion to decline jurisdiction filed by Navigazione, and the affidavit of its proctor filed as representative of the "Respondents" as spelling out their contentions that the action of the court below was correct.[4]

We agree with libelant that the court below was in error in granting the motion to deny jurisdiction under the facts of this case. Particularly is this true with respect to the proceeding *in rem* against the ship itself. As to this feature of the case, the decision of the Second Circuit in

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States and partly performed here; that testimony of the condition of the carbon black when loaded and of the MONROSA at the time of loading was available only in the United States and that it had endeavored to take the depositions of the MONROSA's crew while it was docked at Houston, but that such effort had been arrested by the court below at the instance of respondents; and that under the circumstances Clause 27 was illegal and that it had no application under the facts set forth.

[4] That the bills of lading provided that they were governed by the law of the steamer and the regulations of the Italian Commercial Code; that the vessel was owned by a Genoese corporation and its witnesses were Italians residing in Italy with no expectation of being in the United States at the time of trial; that the damage of the cargo was surveyed upon arrival at Genoa and the witnesses with respect to such damage were located there; that the market value of the cargo should be determined as of the market price at the port of destination; that the seaworthiness of the vessel before and during the voyage could be proved only by Italian witnesses; that the captain of the MONROSA had suffered a heart attack and was no longer aboard the vessel; that all of the cargo was discharged at Genoa, the remainder being damaged to such an extent that it could not be delivered to the other Italian ports, and the witnesses having knowledge thereof were situated in Genoa; that Italy has been a maritime nation for centuries and its courts were familiar with the U. S. Carriage of Goods by Sea Act and were capable of giving effect to it; and that because of the provisions of the bill of lading and also under the doctrine of forum non conveniens, the court below correctly declined jurisdiction.

Muller[5] has no application. The ship there involved had been lost at sea and there was no *in rem* action. The clause of the bill of lading there involved[6] is broader than that in the case before us. The language there encompassed "any claim against the carrier arising under the bill of lading," while the language of the exclusionary clause here was confined to legal proceedings brought against the Captain or ship owners or their agents. There is nothing in Clause 27 which has any tendency to establish that the parties intended that it should be made applicable to an *in rem* proceeding against the ship itself.

What we said recently in *Motor Distributors, Ltd. et al. v. Olaf Pedersen's Rederi*[7] is persuasive here, although we were considering the general question of whether justice would be better subserved by retaining or declining jurisdiction rather than the terms of an exclusionary clause:

> "Moreover, something deeply significant in the whole field of maritime law is here at stake. With respect to ocean-going carriers it seems that one of the most universally recognized rules of law is that which gives the right to libelant, possessing a maritime lien against a vessel, to

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5 224 F. 2d 806, cert. den. 350 U.S. 903. Neither did the other two cases from the same Circuit so heavily relied upon by appellees, the Bio Bio case, 227 F.2d 519, and the Geisha case, 187 F2d 990, involve actions **in rem**. Appellees cite no authority wherein an exclusionary clause similar to that here involved has been held to apply to an action **in rem**.

6 "Jurisdiction. Any claim against the carrier arising under this bill of lading shall be decided according to Swedish law, except as provided elsewhere herein, and in the Swedish courts, to the jurisdiction of which the carrier submits himself."

7 1957, 239 F.2d 463, 467.

proceed in rem in the jurisdiction where the vessel is found."

Finding no authorities to the contrary, and feeling that the exclusionary clause relied on by respondents does not in terms apply to *in rem* proceedings, we hold that the court below was in error when it granted the motion to decline jurisdiction of the *in rem* feature of the libel.[8]

We are of the opinion also that the court below should have denied the motion of respondent Navigazione to decline personal jurisdiction as to it. In essence, the motion was based upon Clause 27 as buttressed by the doctrine of forum non conveniens. Any consideration of such a question starts with the universally accepted rule that agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced.[9]

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8 It is of no importance that respondent Navigazione posted a bond to release the MOROSA. With respect to that action appellees say in their brief: ". . . in order to preserve the security which appellant had acquired by its seizure of the vessel . . . , the court conditioned its order on delivery by appellees to appellant of a good and sufficient bond . . ."

9 The rule is thus epitomized in the headnote of the article on Contracts, 17 C.J.S. §229, p. 603: "Contract provisions intended to oust courts of their jurisdiction in advance, as distinguished from provisions merely imposing conditions on the exercise of the right to sue, are void. This rule has been frequently considered in determining the validity of contracts as to venue, periods of limitation, notice or demand, and evidence."

And see also 14 Am. Jur., Courts, §196, pp. 389-390 which thus summarizes the rule: "Both in England and the United States it has been decided in a great number of cases, and conceded in an equally large number of other cases, to be settled law that the jurisdiction of the courts cannot be ousted by the private agreement of individuals made in advance, that the private persons are incompetent to

We do not find it necessary to espouse or reject the position taken by the Court of Appeals of the Second Circuit in the cases mentioned above, which are relied upon as marking a departure from this general rule.[10] The facts before that Court in those cases were, in each instance, materially different from those before us. In addition to those already discussed, it is important to note that the contracts of carriage here were made in the United States and were partially performed here, that the bills of lading specifically adopted the Carriage of Goods by Sea Act of the United States as part of their provisions and were printed in English, tending to indicate that the parties recognized that the courts of the United States were in a good position to pass upon the rights of the parties to them. It is further noteworthy that the testimony of the crew of the MONROSA was sought by libelant and resisted by respondents when the crew were in Houston; and, finally respondents invoked the jurisdiction of the court below in general terms and rested upon this action several months before challenging that jurisdiction by its motion.

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make any such binding contracts, and that all such contracts are illegal and void as against public policy."

Cited to both texts are a number of decisions of the Supreme Court of the United States; and cf. our decision in Burt v. Isthmus Development Co., 1955, 218 F.2d 353, 356, cert. den. 349 U.S. 922.

10 Those cases do not purport to construe such a provision as Clause 27 as creating an absolute right but one to be accorded if all of the facts of a given case make it reasonable to give it effect. Several District Courts have considered the cases and have refused to decline jurisdiction despite the presence of similar clauses, e.g., Chemical Carriers, Inc. v. L. Smit & Company's etc. S.D. N.Y., 1957, 154 F. Supp. 886; Sociedade Brasileira etc. v. S. S. Punta Del Este, etc., D. of N.J., 1955, 135 F. Supp. 394; and St. Paul Fire & Marine Ins. Co. v. The Republica de Venezeula et al, S.D. N.Y., 1952, 105 F. Supp. 272.

As heretofore pointed out, respondents pitch their argument to a considerable extent upon the doctrine of forum non conveniens, recognizing that Clause 27 alone did not provide a firm basis upon which to stand. The rule governing application of that doctrine is thus expressed by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 1946, 330 U.S. 501, 508, "But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."

The judgment of the court below granting the motion to decline jurisdiction and vacating and discharging the stipulation to abide the decree of the court below is reversed and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

A true copy
Test. EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By CLARA R. JAMES
Deputy
New Orleans, Louisiana
(Seal)

JUDGMENT.

Extract from the Minutes of April 18, 1958.

CARBON BLACK EXPORT, INC.,

No. 16667. versus

SS MONROSA, Her Engines, Tackle, Etc., and NAVIGAIONE ALTA ITALIA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court granting the motion to decline jurisdiction and vacating and discharging the stipulation to abide the decree of said court, in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellees, SS Monrosa, Her Engines, Tackle, Etc., and Navigazione Alta Italia, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX B

DOCUMENT No. 403

Committee to Consider the Decisions of the Courts of the Second Circuit Regarding Jurisdiction and Forum

Mr. Nicholas J. Healy, III, Chairman, read the following report:

The Committee met and duly considered the decision of the United States Court of Appeals for the Second Circuit in *The Oklahoma (Wm. H. Muller & Co., Inc., v. Swedish American Line, Ltd.)*, 224 F. 2d 806, 1955 A.M.C. 1687, cert. denied, 100 L. Ed. 103, 1955 A.M.C. 2406, and the decision of the United States District Court for the Southern District of New York in *The Bio Bio*, 127 F. Supp. 13, aff'd 227 F. 2d 519 (C.C.A. 2). Consideration was also given to *The Punta Del Este*, 135 F. Supp. 394, 1955 A.M.C. 2288, a decision of the United States District Court for the District of New Jersey.

In *The Oklahoma*, supra, Judge Conger exercised his discretion and declined to retain jurisdiction of a suit brought by a New York corporation to recover for the loss of a shipment of 1,000 bags of cocoa beans when the Oklahoma sank while en route from Gothenburg, Sweden, to United States Atlantic ports. Respondents moved for an order declining jurisdiction and dismissing the libel on the ground that the parties had agreed to jurisdiction in Swedish Court, and upon the ground of *forum non conveniens*. Respondents pleaded the bill of lading, including the jurisdictional clause, reading as follows:

> "JURISDICTION. Any claims against the carrier arising under this Bill of Lading shall be decided according to Swedish law, except as provided elsewhere

herein, and in the Swedish courts, to the jurisdiction of which the Carrier submits himself."

The District Court held that there was nothing in the Carriage of Goods by Sea Act which invalidated such a stipulation, and, since there was no showing that libelant could not obtain justice in Sweden, gave the agreement the full effect. The Court also stated:

> "Were I to reach the question of *forum non conveniens*, I would hold to the same conclusion in view of the agreement plus the fact that the Oklahoma is Swedish owned, was built in Sweden, and all the crew members reside there."

On appeal the Court of Appeals agreed that the Carriage of Goods by Sea Act, 1936, did not invalidate the jurisdictional agreement and held that the enforcement of a clause such as the one quoted would not be in contravention of public policy. The Court said "that in each case the enforceability of such an agreement depends upon its reasonableness." The Court of Appeals held that the District Court did have jurisdiction, but went on to say:

> "But if in the proper exercise of its jurisdiction, by a preliminary ruling the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented."

The Court of Appeals then considered "the setting of this case", as shown by respondents, and held:

"On this showing, we think the judge below could rightly conclude that the jurisdictional agreement was not unreasonable and that the adherence of the parties to that agreement, which for aught that appears was freely given, should be given effect. In declining jurisdiction and dismissing the complaint we think he was well within the limits of lawful judicial discretion."

In *The Bio Bio*, the Southern District Court followed *The Oklahoma*.

In *The Punta Del Este*, the District Court for the District of New Jersey retained jurisdiction of a suit between foreigners despite an agreement as to foreign jurisdiction.

One additional case involving similar issues is pending in a District Court in the Fifth Circuit.

[4076]

It is the view of a majority of the Committee that it would be inadvisable for this Association to take any action with respect to *The Oklahoma* decision at the present time, for the following reasons:

1.) A similar case is now pending in a district court in the Fifth Circuit, and it is conceivable that that case may eventually come before the Court of Appeals and possibly before the United States Supreme Court. It is therefore conceivable that before long *The Oklahoma* case may be overruled.

2.) If legislation to counteract the effect of *The Oklahoma* were enacted, it would limit the exercise of judicial discretion to decline jurisdiction in cases where the particular Court feels that justice would best be served by declining it. This would be a very drastic limitation by

the legislature of a prerogative which traditionally has been considered that of the judiciary.

3.) Thus far, there has been no serious prejudice to American litigants as a class as a result of *The Oklahoma* decision.

4.) More time will have to elapse before the full import of *The Oklahoma* decision can be properly evaluated.

5.) The effect of *The Oklahoma* decision is not so momentous as to warrant the sponsorship, by this Association, of a bill to counteract its effect, merely because a substantial number, or perhaps even a bare majority of the members of the Association, may disagree with the United States Court of Appeals for the Second Circuit. It is felt that this Association should not sponsor Congressional legislation to counteract the effect of a particular court decision unless a substantial majority of the members feel that the decision is contrary to the objectives of the Association.

The Committee recommends that it be continued, at least until the next meeting of the Association, for the purpose of considering and reporting on any similar decisions which may be rendered, but that no further action be taken by the Association at this time.

Respectfully submitted,

NICHOLAS J. HEALY, 3RD,
Chairman
NORMAN M. BARRON
HENRY C. BLACKISTON
JOHN F. GERITY
GORDON W. PAULSEN

[4077]

Mr. Henry N. Longley read the following minority report:

We dissent from the Report of the Committe to be submitted to the Association at its meeting to be held on November 9, 1956.

At the meeting of the Committee on November 1, 1956, and with particular reference to the decision of the Court of Appeals for the Second Circuit in *The Oklahoma*, 224 Fed. 2d 806, Mr. Longley moved that the Committee prepare and submit to the Association for its consideration a bill for ultimate submission to the Congress of the United States, making invalid a clause in a shipping contract requiring an American citizen suing in his own right, to pursue his rights in some foreign country, such as that of the flag of the carrying ship.

The motion was defeated. The majority of the Committee thought that no action should be taken until more and similar cases concerning the question of an American citizen's absolute right to maintain jurisdiction in American courts were decided.

We believe that the decision of the Court of Appeals for the Second Circuit in *The Oklahoma* case and the denial by the United States Supreme Court (350 U. S. 903), of the petition for a writ of certiorari are sufficient indications that the courts, finding no prohibition in the United States Carriage of Goods by Sea Act or any other Act against "jurisdiction" clauses in bills of lading, will continue to hold that a citizen of the United States is bound by such clauses to institute actions in a foreign country where there is a bill of lading clause containing that limitation of action.

We think the state of affairs which these clauses and *The Oklahoma* case has created is unfair to American citizens engaged in international commerce. Under this decision an American citizen may be deprived of redress in our courts by the simple expedient of a foreign ship-owner inserting in its bill of lading a provision requiring suit in the country of the ship's flag.

The fact that the Court of Appeals for the Second Circuit based its holding on the ground that the facts of *The Oklahoma* case made the bill of lading clause "reasonable", only serves to confuse rights about which there should be no question in the minds of American businessmen.

Furthermore, the duty under the clauses in question to sue in a foreign country practically eliminates any right of action which a cargo owner may have where the amount of the loss does not justify referral of the case to a foreign country. Moreover, where the ship flies the

[4078]

flag of a foreign country which has a system of law quite different from our own—such as, Japan, for instance—the decision in effect destroys the rights of an American citizen.

This windfall to foreign ship owners, we believe, will not be condoned by Congress which sought through "the Carriage of Goods by Sea Act" to remove long standing inequities against cargo owners resulting from other unilateral clauses in ocean bills of lading.

Respectfully,

HENRY N. LONGLEY
GEORGE B. WARBURTON

Mr. Longley argued that bill of lading clauses which take from American citizens the right to appeal to American courts destroy the rights of American citizens whose cargo is carried on foreign flag ships. He urged the adoption of the Minority Report.

Mr. Healy moved the adoption of the Majority Report and the motion was duly seconded.

Mr. William G. Symmers spoke in opposition to the motion. He pointed out that under the law of other countries liability can be limited to less than the United States limitation of $500 per package and that in South American countries and Japan liability can be limited to zero. Thus such clauses give an advantage to foreign shipowners in competition with American shipowners.

Mr. Knauth urged that legislation be proposed which would assure the protection of United States courts to foreign corporations owned and controlled by United States citizens. The President ruled that Mr. Knauth's remarks were not germane to the present motion, though they would be pertinent to a motion to approve the Minority Report.

Mr. MacDonald Deming spoke in support of the motion. He pointed out that the decision in *The Oklahoma* was not a holding that the clause was valid under all circumstances and that it would have to be determined whether or not enforcement of the clause was reasonable under the facts of each case. The effect of *The Oklahoma* was in his opinion only to shift the burden of proof of *forum non conveniens*. He therefore urged that no action be taken until a body of judicial opinion develops.

[4079]

Mr. Edward B. Hayes of Chicago spoke in opposition to the motion. He expressed the opinion that the doctrine of *The Oklahoma* would be discouraging to a young port such as Chicago.

Mr. Cyril F. Powers suggested that, if something were going to be done, action should be taken to control the increasing tendency of foreign underwriters to bring their claims to the United States to collect under circumstances where they cannot collect under their own laws.

The President summarized the question before the house as being whether to go along with the majority, which would do nothing for the present, or to go along with the minority, which would do something but would take into account various suggestions, such as that made by Mr. Powers. Mr. Longley agreed with this summary.

Mr. Joseph T. McGowan spoke in opposition to the motion. He mentioned a case of his pending in Texas, in which the Court has a motion to decline jurisdiction under advisement and may not decide the motion until after expiration of the time to sue. If he should lose the motion, it might be too late to sue abroad. He therefore urged adoption of the Minority Report.

Mr. David P. Dawson spoke in support of the motion. He suggested the following considerations: (1) that our courts could be relied upon not to decline jurisdiction in such a way as to cause any real injustice, (2) that shippers can protect themselves by shipping only on American ships and that shippers can get protection through the conferences, and (3) that we should carefully consider

the possibility of retaliatory action by foreign countries. He therefore urged adoption of the Majority Report.

Mr. Henry C. Blackiston pointed out that many who had spoken to the motion were pleading special interests which they happened to represent and that the vote would probably be along similar lines. He suggested that it would be inappropriate for the Association, representing such diverse interests, to take a position on this subject but that the special interests involved should act through their respective trade organizations.

Mr. Longley summarized the discussion in opposition to the motion, emphasizing that *The Oklahoma* is against American interests. Mr. Heady summarized in support of the motion, emphasizing that it would be a dangerous

[4080]

precedent for the Association to take a stand supported by only some, or possibly a bare majority, of the membership.

The question was put and, on a show of hands, the motion was lost by a vote of 30 in favor and 39 opposed.

Mr. Longley moved the adoption of the Minority Report and the motion was duly seconded.

The question was put and, on a show of hands, the motion was carried by a vote of 37 in favor and 33 opposed.

Mr. Herbert M. Lord suggested that any representation made to any official body be accompanied by an indication of the closeness of the vote.

Mr. Deming, seconded by Mr. Knauth, moved for reconsideration on the basis that the Majority and Minority Reports should be put before the entire membership before

a decision was made. The motion was ruled to be out of order, since Mr. Deming had voted against the Minority Report.

Mr. Norman M. Barron moved that any bill prepared for submission to the Association be circulated to the entire membership before any action is taken thereon. The motion was duly seconded and unanimously carried.

Mr. Philp K. Verleger suggested that a new committee be appointed to draft the proposed legislation and that the majority of such a committee should not be opposed to the principle of the legislation.

The President stated that he would at least enlarge the present committee.

APPENDIX C

[4173]

DOCUMENT NO. 409.

THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

Report of the Committee to Consider Decisions of the Courts of the Second Circuit Regarding Jurisdiction and Forum

At the meeting of the Association, held November 9, 1956, a majority of the former committee submitted a report discussing the decisions of the U. S. Court of Appeals for the Second Circuit in *The Oklahoma*, 224 F. (2d) 806; 1955 A. M. C. 1687; of the Southern District of New York in *The Bio Bio*, 127 F. Supp. 17, affirmed 227 F. (2d) 519 (C. A. 2) and of the District of New Jersey in *The Punta del Este*, 135 F. Supp. 394. It was held in the first two cases cited that United States courts should refuse to take jurisdiction of suits filed by United States citizens as cargo owners against foreign vessel owners if the bill of lading contracts contain provisions requiring that suits based on breach of their terms, be filed in the courts of the country of the ships' flags.

The report of the majority of the former committee recommended that no action be taken by the Association in relation to remedial legislation. A minority report was filed which pointed out that the decisions made it clear that without a prohibition in the United States Carriage of Goods by Sea Act or some other act against "jurisdictional" clauses in bills of lading, courts would continue to hold that a citizen of the United States having claims against a foreign vessel owner for damage to cargo, may not

look to the courts of his own country for justice, but is bound to institute any suit in a foreign country where there is a bill of lading provision limiting suit to the country of the ship's flag. It was recommended that a bill be introduced to amend the Carriage of Goods by Sea Act in this regard.

A motion to adopt the majority report having been lost, the Association adopted the minority report and directed that any proposed legislation which the Committee might advance for the approval of the Association, be circulated among the entire membership of the Association before any action should be taken on the Committee's recommendation.

[4174]

It having been suggested at the meeting of the Association that a new committee be appointed to draft the proposed legislation with a majority not opposed to the principle of remedial legislation, the president re-appointed the former committee with the addition of three new members.

Those members of the present committee who sign this report recommend to the Association that a bill be introduced in Congress amending the Carriage of Goods by Sea Act and that the Association actively work for adoption by Congress of this amendment. The amendment proposed by the Committee is to add the following language after Sec. 9:

> Any clause, covenant or agreement in a contract subject to this Act requiring the prosecution of claims in the courts of a foreign country shall be null and void and of no effect. A citizen of the United States of America suing in his or its own right to recover damages from a carrier for breach of such a contract

shall not be barred from prosecuting his or its suit in the courts of the United States of America.

The purpose of the proposed amendment is, we think, clear. Prior to the decision in *The Oklahoma* (supra) it had long been the established law that a contractual provision seeking to oust a United States court of jurisdiction was void. The result of the decisions in *The Oklahoma*, *The Bio Bio*, and in the most recent case of *The Monrosa*, decided in the Eastern District of Texas (not reported), inhibiting a United States citizen from pursuing his rights against a foreign vessel owner in a United States court is, we think, so strange and inequitable as to require legislative action. The adoption by the Association, at the meeting of November 9, 1956, of the minority report of the former committee, makes it apparent that the Association as a whole agreed that legislation is called for.

Respectfully submitted,

RUSSEL A. MACKEY;
RUSSEL T. MOUNT;
WILLIAM G. SYMMERS;
GEORGE B. WARBURTON;
HENRY N. LONGLEY, Chairman.

October 29, 1957.

[4175]

The undersigned members of the present Committee remain opposed to the introduction of the proposed bill, for the reasons stated in the report submitted at the 1956 Fall Meeting by a majority of the Committee as it was then constituted. That report, which failed of adoption by a vote of 39 to 30 of the members of the Association present

and voting, appears at pp. 4074-6 of M. L. A. Document No. 403 (Minutes of the 1956 Fall Meeting).

It is still felt there has been no serious prejudice to American litigants as a class as a result of *The Oklahoma* decision, and that this Association should not sponsor legislation to counteract the effect of isolated court decisions unless a substantial majority of the members believe that the decisions are contrary to the objectives of the Association.

In any event, if the Association is going to sponsor a bill to amend the Carriage of Goods Act, the undersigned members of the Committee feel that the bill should not be limited to the proposed addition of Section 9a, but should be enlarged so as to cover other amendments as well. For example, many members of the Association would probably be in favor of an amendment which would nullify the effect of the "both-to-blame" decision *(The Esso Belgium*, 343 U.S. 236, 1952 A.M.C. 659).

Respectfully submitted,

NORMAN M. BARRON,
HENRY C. BLACKISTON,
JOHN F. GERITY,
NICHOLAS J. HEALY, 3rd,
GORDON W. PAULSEN.

APPENDIX D

[4226]

DOCUMENT No. 414

Committee to Consider the Decision of the Courts Regarding Jurisdiction and Forum:

Mr. Henry N. Longley, Chairman of the Committee, referred to the Committee's report, which had been circulated as Association Document No. 409, consisting of two dissenting reports each signed by five members of the Committee, hereinafter for convenience referred to as the "Majority Report" and the "Minority Report" respectively.

Mr. Longley moved the adoption of the "Majority Report" and spoke in support thereof. He argued that, under recent decisions, United States citizens are deprived of the right of choosing the forum in which to sue and that those who signed the "Minority Report" represented the interests of foreign shipowners.

Mr. Nicholas J. Healy, III, spoke in support of the "Minority Report". He argued that no court had abused its discretion in this regard in the past year. He also pointed out that the Association is deeply divided on this question, the "Majority Report" being in the interest of only one segment of the membership, and argued that the Association should not take a stand on a question as to which it is so divided.

[4227]

Mr. Longley's motion was duly seconded.

Mr. James M. Estabrook spoke in support of the "Minority Report" on the ground that the "Majority Report" does not substantially represent the great majority

of the Association and is therefore not a persuasive authority on which to go to Congress.

Mr. Charles S. Haight also spoke in support of the "Minority Report". He argued that the courts should not be deprived of their discretion to remit cases to foreign courts because in cases where many witnesses would have to be brought from abroad at great expense to require a trial in the United States would be an injustice. He also pointed out that the *Oklahoma* decision, while it reflected and talked of the Bill of Lading clause, relied on the discretion of the admiralty courts in declining to retain jurisdiction.

Mr. Haight also pointed out that a move to change the Carriage of Goods by Sea Act in one respect would raise the question of amending it in other respects.

Mr. George B. Warburton, speaking in support of the "Majority Report", argued that cargo interests had been prejudiced during the period since the *Oklahoma* decision and that the Association should delay no longer in the matter.

Mr. Norman M. Barron spoke in support of the "Minority Report", arguing that the supporters of the "Majority Report" had not made a showing of actual prejudice to the interests of United States citizens.

Mr. Warburton mentioned that in the *Oklahoma* litigation in Sweden, the cargo interests were ordered by the court to post a bond for $25,000 and encountered technical difficulties which they would not have met in a United States court.

Mr. John F. Gerity argued that the "Minority Report" is out of order in view of the vote of the Association on this subject at the 1956 Fall Meeting.

Mr. Michael F. Whelan spoke in opposition to the "Majority Report". Mr. Whelan argued that the proposed amendment to the Carriage of Goods by Sea Act was so worded that it would give rise to a number of disputes as to its meaning.

[4228]

Mr. William H. Maness, in opposition to the "Majority Report", argued that it proposed class legislation and would tend to destroy international uniformity of law. He also argued that the wording of the proposed amendment was not clear.

Mr. Philip K. Verleger suggested that the law should be clarified to define narrowly and clearly which cases should and which should not be remitted to foreign jurisdictions to avoid having two suits pending in different jurisdictions while awaiting a decision in the preferred jurisdiction.

The question was put and the vote was 46 "yes" and 78 "no", the motion being lost.

Mr. Martin P. Detels, Chairman of the Committee, reported with reference to the *Wilburn Boat Co.* case that it was an action begun in the State Court and removed to the Federal Court in Texas, where the trial court decided in favor of the underwriters who were sued on a marine policy which covered the boat against fire. The decision of the District Court was affirmed by the Court of Appeals, on the basis of the maritime law. Then the case was taken to the Supreme Court which held that it should be decided according to State law. It went back to the District Court which, on the same evidence as before, then found in favor of the insured on all points, on the basis of the Texas State law. It is now again on appeal to the Court of Appeals.

FILED
DEC 31
JAMES R. BROWNING, Clerk

No. 178

IN THE

Supreme Court of the United States

October Term, 1958

SS MONROSA, HER ENGINES, TACKLE, ETC., AND NAVIGAZIONE ALTA ITALIA, *Petitioners*

-VERSUS-

CARBON BLACK EXPORT, INC., *Respondent*

ON WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE PETITIONERS

GEORGE W. RENAUDIN
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No. 178

IN THE

Supreme Court of the United States

October Term, 1958

SS MONROSA, HER ENGINES, TACKLE, ETC., AND NAVIGAZIONE ALTA ITALIA, *Petitioners*

-versus-

CARBON BLACK EXPORT, INC., *Respondent*

ON WRIT OF CERTIORARI To the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONERS

Citations To Opinions Below

The memorandum opinion of the United States District Judge is unreported and appears at R. 36-37. The opinion of the Court of Appeals for the Fifth Circuit (R. 46-52) is reported at 254 F. 2d 297.

Jurisdiction

The judgment of the Court of Appeals was entered April 18, 1958. (R. 52). The petition for a writ of certiorari was filed July 16, 1958, and was granted October 13, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

Questions Presented

I. Is a clause in a foreign shipowner's bill of lading in which Respondent (cargo owner) and Petitioner (vessel owner) agreed to adjudicate claims for damage to cargo in the Courts of Genoa, Italy, a valid and enforceable agreement?

II. If such agreement is valid, did the agreement of Respondent and Petitioner here include *in rem* actions against the vessel itself?

Statement

Invoking the admiralty and maritime jurisdiction of the United States, Respondent, Carbon Black Export, Inc., filed its original libel (R. 4-11), alleging the issuance of bills of lading by the Petitioner, covering a cargo of carbon black loaded at Houston, Texas, and New Orleans, Louisiana, in December, 1955, aboard the SS MONROSA, a vessel owned and operated by the Petitioner, and flying the Italian flag. This cargo was to be transported to the Italian ports of Genoa, Naples, Venice and Trieste. These bills of lading constituted the contract for carriage of this carbon black between Petitioner and Respondent. The cargo was damaged upon its arrival in Genoa, Italy, where it was discharged.

The libel (R. 4-11) both *in rem* against the MONROSA and *in personam* against Petitioner, prayed for damages

allegedly sustained by the Respondent by virtue of the damage to the cargo in the amount of $110,000.

To obtain security for its claim, Respondent had a warrant of seizure issued against the SS MONROSA at Houston, Texas, in connection with the *in rem* portion of the libel, and to obtain release of its vessel Petitioner filed a Stipulation to Abide Decree (R. 12) on April 9, 1956, and as is customary in admiralty matters, Petitioner likewise on the same day filed its Notice of Appearance (R. 49) and Claim of Owner (R. 50), incorrectly designated in the certified transcript of record as Claim of "Order".

The bill of lading (R. 20), the contract between the parties, contained certain express agreements embodied in Clauses 27, 28, 29 and 32 thereof,[1] that no legal proceedings

[1] "Clause 27—Also, that no legal proceedings may be brought against the Captain or ship owners or their agents in respect to any loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, notwithstanding that the ship may be legally represented there."

"Clause 28—Also, that this contract is governed by the law of the steamer, carrying the goods, but any average that may arise on the voyage to be adjusted according to conditions named on the reverse side."

"Clause 29—Also, that in regard to all and everything which is not regulated and provided for in the present contract of transport, the regulation of the Italian Commercial Code will be in vigour."

"Clause 32—This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights of immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such terms shall be void to that extent, but no further."

for loss or damage to the cargo would be brought by Respondent except in Genoa, Italy. Petitioner, in its Motion to Decline Jurisdiction (R. 14-20), while recognizing and acknowledging the basic Admiralty jurisdiction of the United States District Court, moved the Court to exercise its jurisdiction by granting specific performance of the agreement in the bills of lading to adjudicate the Respondent's damage claim in Genoa, Italy.

On July 27, 1956, Petitioner (Respondent in the admiralty action in the District Court) filed its Motion to Decline Jurisdiction (R. 14-20), and attached as part of its Motion to Decline Jurisdiction a photostatic copy of Bill of Lading No. 7 (R. 20), covering twenty-five bags of the cargo of carbon black loaded on the MONROSA at Houston for delivery to Genoa, Italy. A total of twenty-seven bills of lading were issued, as the libel (R. 4-11) alleges, and all of the printed terms thereon are identical to Bill of Lading No. 7 (R. 20).

The Respondent, Libellant below, filed the Affidavit of Carl G. Stearns in opposition to the Motion to Decline Jurisdiction (R. 21-28) on September 21, 1956.

In support of its Motion to Decline Jurisdiction (R. 14-20), Petitioner filed on October 2, 1956, the Affidavit of E. D. Vickery in support of the Motion to Decline Jurisdiction (R. 29-32).

The District Court granted the Motion to Decline Jurisdiction and filed its Memorandum Opinion on December 31, 1956, (R. 32) on the ground that the agreement to adjudicate cargo claims only in Genoa was not shown to be an unreasonable one. The District Court relied on the decision of the United States Court of Appeals for the

Second Circuit in *William H. Muller & Co. v. Swedish American Line, Ltd., et al.*, 224 F. 2d 806 (2 C. A.), cert. denied 350 U.S. 903 (1955). However, in order to preserve the security which Respondent had acquired by its seizure of the vessel and the posting by Petitioner of a release bond (R. 12) with surety in the amount of $100,000, the court conditioned its order sustaining the Motion to Decline Jurisdiction on delivery by Petitioner to Respondent of a good and sufficient bond in the same principal sum guaranteeing the payment of any final judgment that might be had in favor of Respondent against Petitioner's ship, the SS MONROSA, and further requiring that said bond be kept in effect by Petitioner until termination of the controversy involved in this suit. Such bond was executed, approved by Respondent's proctors, and timely filed and delivered (R. 33-36).

While the Motion was being considered by the District Court, Petitioner granted Respondent an extension of time in which to sue in Italy, since limitations was about to run. Subsequent to the District Court's decision in this action a suit has actually been filed by Respondent against Petitioner and its vessel in Genoa, Italy for this same cargo damage.

Upon appeal, the United States Court of Appeals for the Fifth Circuit reversed and remanded this cause to the District Court. The Court of Appeals based its reversal on two grounds:

1. That the agreement to adjudicate claims in Genoa was void because contrary to public policy, and

2. That the agreement did not include *in rem* actions against the vessel itself as well as *in personam* actions against Petitioner.

Petitioners submit that such reversal was clearly in error.

SUMMARY OF ARGUMENT

I. In Clause 27 of the bills of lading covering the cargo involved in this case, the Petitioners and Respondent mutually agreed that all claims for any loss or damage to this cargo would be adjudicated in the Courts of Genoa, Italy.

The Court of Appeals below erroneously interpreted this clause of the bill of lading to be an agreement ousting the court of jurisdiction and therefore held it to be contrary to public policy.

In so doing, the Court of Appeals below completely misinterpreted the nature of the motion filed by Petitioners which specifically requested the District Court below to exercise its basic Admiralty jurisdiction and enforce Clause 27 of the bills of lading by requiring Respondent to assert its cause of action against Petitioners in the agreed upon forum in Genoa, Italy. Petitioners acknowledged the basic Admiralty jurisdiction of the District Court below and sought specific enforcement of one of the provisions in the bill of lading covering the cargo allegedly damaged.

Such clauses providing for legal proceedings in an agreed upon forum have previously been held in three separate de-

cisions by the Court of Appeals for the Second Circuit[2] not to be agreements ousting a Court of jurisdiction but valid contractual agreements between the parties which the Courts would enforce so long as the agreement was a reasonable one.

That such an agreement to adjudicate claims for cargo damage in a particular forum is not contrary to the public policy of the United States was clearly indicated by the approach taken to this matter by the Congress of the United States when it passed the United States Carriage of Goods by Sea Act in 1936[3] and ratified the Brussel's Convention April 1, 1935 (with one understanding) and May 6, 1937 (with a second understanding).[4] In passing the United States Carriage of Goods by Sea Act, Congress did not grant exclusive jurisdiction to any particular court or courts nor did it enact any provisions relating to venue. Exclusive jurisdiction clauses had been placed in the Australian and Canadian Carriage of Goods by Sea Acts of which Congress was well aware. The omission of any exclusive jurisdictional provision in the United States Carriage of Goods by Sea Act was a clear indication that in the opinion of the Congress the public policy of this country did not require such a provision. The public policy of this country, in fact, strongly requires that no such exclusive jurisdictional provision be placed in the Carriage of Goods

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[2] **William H. Muller & Co. v. Swedish American Line, Ltd., et al.**, 224 F. 2d 806 (2 C.A.), cert. denied 350 U.S. 903 (1955); **The Geisha-Cerro De Pasco Copper Corp. v. Knut Knutsen**, O.A.S., 187 F. 2d 990 (2 C.A., 1951); **Murillo, Ltd., et al. v. The Bio Bio, et al.**, 227 F. 2d 519 (2 C.A. 1955), aff. 127 F. Supp. 13 (S.D. N.Y. 1955).

[3] 46 U.S.C. 1300 ff.

[4] Knauth on Ocean Bills of Lading (4th Ed. 1953), pp. 77-85.

by Sea Act, for in its present form it gives encouragement to American shippers to ship aboard American vessels rather than foreign vessels. When American vessels are used, all cargo claims are assertable in the United States and the fact that shippers aboard foreign vessels will be required to litigate their claims for loss or damage in foreign countries will strongly influence those shippers to ship aboard American flag vessels and thus bolster the American Merchant Marine which is heavily subsidized by the United States Government for its very existence.

With Congress not having directly declared an agreement to adjudicate a claim for cargo damage in a foreign country to be invalid and contrary to the public policy of this country, and it clearly appearing that the public policy of this country would best be served by giving every possible encouragement to American shippers to ship aboard American vessels, the declaration of the invalidity of an agreement such as is involved here to adjudicate claims in a foreign country as being contrary to public policy should in as important a field as Admiralty and Maritime law await specific action by the Congress and not be accomplished by a court decision.

II. Since the agreement to adjudicate claims for cargo damage in Genoa, Italy is not contrary to public policy if it is a reasonable one, the reasonableness of the agreement as determined by the District Court below is clear.

After a carful consideration of all of the factors involved in this case, the District Court below concluded that the agreement to adjudicate claims relating to cargo damage in Genoa, Italy was not an unreasonable one. This finding by the District Court below cannot be set aside

unless it is clearly shown that his finding that the agreement was not an unreasonable one was an abuse of discretion or was clearly erroneous. It has never been seriously asserted by Respondent and cannot be that this decision by the District Court below was an abuse of its discretion in exercising its basic Admiralty jurisdiction or that it was clearly erroneous.

While obviously there are some factors which might indicate that some evidence would have to be obtained in this country, it is clear that substantially all of the most material and important evidence must be obtained from records or witnesses residing in Italy, the agreed upon forum,

Under all of the facts and circumstances, the District Court below did not abuse its discretion in enforcing the contractual agreement made by Petitioners and Respondent to adjudicate claims such as those asserted in this action in the Court of Genoa, Italy.

III. The Court of Appeals below also held that the agreement here involved did not cover *in rem* actions against the vessel itself as well as *in personam* actions against the vessel owner.

The clear intent of the agreement was to cover legal proceedings of any kind in connection with cargo damage. It therefore prevents *in rem* actions against Petitioner's vessel as well as *in personam* actions against Petitioner. To permit Respondent to prosecute its cause of action against the vessel *in rem* and to uphold the agreement not to permit the libel *in personam* against Petitioner is to permit Respondent to circumvent its agreement by extending the separate identity of a vessel to never intended

extremes. The existence of a lien against a vessel is merely a security device in a cause of cargo damage and Respondent has acquired all the security it could ever obtain by the corporate surety bond on file in the United States District Court in Houston, which stands as security for any decree Respondent may obtain in its suit in Genoa, Italy.

To permit the divorcing of the *in rem* proceeding as completely as did the Court of Appeals below is not only contrary to decisions of the Courts of Appeals of the Second and Third Circuits, but to an earlier decision of its own.[5]

This contention of Respondent is but an ingenious device now advanced in an attempt to evade its agreement to institute this action in the courts of Genoa, Italy, which agreement it now considers to be an unwise one.

ARGUMENT

Agreement To Litigate Claims In Italy Is Not Contrary To Public Policy

In Clause 27 of the bills of lading, Petitioners and Respondent mutually agreed that all claims for any loss or damage to the cargo covered by the bills of lading would be adjudicated in the Courts of Genoa, Italy.

The District Court below, accepting jurisdiction as it had to do, in its discretion determined that this agreement to adjudicate claims in Genoa, Italy, was not an unreason-

[5] **Smith v. The Mormacdale**, 198 F. 2d 849 (3 C.A. 1952); **Bennett v. SS. Mormacteal, et al.**, 254 F. 2d 138 (2 C.A. 1958), certiorari denied Oct. 13, 1958; and **Samuels v. Munson Steamship Line**, 63 F. 2d 861 (5 C.C.A. 1933).

able one and entered an order directing the Respondent to comply with its contractual agreement and adjudicate its claim for damage to the cargo covered by the bills of lading in Genoa, Italy.

The Court of Appeals below erroneously interpreted this clause in the bill of lading to be an agreement ousting the court of jurisdiction and therefore contrary to public policy. Its reversal of the District Court's decision rested primarily on this ground.

The Court of Appeals below thus completely misinterpreted the nature of the motion filed by Petitioners requesting the District Court to enforce Clause 27 of the bills of lading. As Petitioners readily acknowledged and admitted both in the District Court below and the Court of Appeals below, there has never been and there is not now, any question but what the District Court had basic jurisdiction in admiralty over the cause of action as alleged in the Respondent's original libel. Petitioners have not, and do not now contest the basic Admiralty jurisdiction of the courts of the United States in this matter, but in fact continue to seek now, as they did in the District Court, the exercise of that basic jurisdiction by the courts of the United States to secure the specific enforcement of one of the provisions of the contract of carriage that all claims for cargo damage such as are involved in this case must be asserted in the courts of Genoa, Italy.

Unless Clause 27 of the contract of carriage is null and void as contrary to public policy as the Court of Appeals below held, Petitioners are entitled to have the courts of the United States compel the Respondent to live up to its contractual agreement and litigate this case in the agreed upon forum.

Thus, the Petitioners have not, and do not now contest the basic Admiralty jurisdiction of the courts of the United States in this case but simply have requested that these courts in the exercise of their sound discretion give effect to the contractual agreement of the parties since it is not an unreasonable one.

Agreements such as the one here involved in Clause 27 of the bills of lading prior to the filing of Petitioners' original motion properly had been held not to be clauses ousting a court of jurisdiction as the Court of Appeals below held, but as a binding contractual agreement between the parties which the courts would enforce in three separate decisions by the Court of Appeals for the Second Circuit. When Petitioners moved for an enforcement of this contractual agreement, they confessed the District Court's basic Admiralty jurisdiction and simply asked for enforcement of the contractual agreement between the parties as was done by the Court of Appeals for the Second Circuit in the following three cases:

The Geisha-Cerro De Pasco Copper Corp. v. Knut Knutsen, O.A.S., 178 F. 2d 990 (1951);
William H. Muller & Co. v. Swedish American Line, Ltd., et al., 224 F. 2d 806 (1955), cert. denied 350 U.S. 903 (1955);
Murillo, Ltd., et al. v. The Bio Bio, et al., 227 F. 2d 519, Aff. Per Curiam, 127 F. Supp. 13 (S.D.N.Y., 1955).

In the *Geisha* the Court of Appeals for the Second Circuit said in part:

"At any rate, the District Court here did exercise jurisdiction to decide, in its discretion, whether it was

> the appropriate forum to hear the case on the merits."[1]
> "Footnote 1 - It might be said that the Court took jurisdiction and granted specific performance of Clause 12 of the bill on the grounds that the provision was fair and not against public policy, all the facts considered."[6]

In the *Muller* case the Court of Appeals for the Second Circuit adhered to its ruling in the *Geisha* in the following language:

> "We agree with the Appellant to this extent: The parties by agreement cannot oust a Court of jurisdiction otherwise obtaining; notwithstanding the agreement, the Court has jurisdiction. But if in the proper exercise of its jurisdiction, by a preliminary ruling, the Court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented."[7]

It was recognized in these well-reasoned decisions that agreements such as the one involved in this case have been criticized and attacked as being contrary to public policy. However, modernizing the outmoded reluctance of Courts to uphold freedom of contract in this respect, in the *Muller* case the Court of Appeals for the Second Circuit stated:

> "It is further contended that the enforcement of this clause would be in contravention of public policy. It is true that there has been much difference of opinion over the validity of contractual provisions which purport to limit a jurisdiction which would otherwise

[6] 187 F. 2d 990, at page 991.

[7] 224 F. 2d 806, at page 808. Cert. Denied 350 U.S. 903 (1955).

attach. The law has long viewed such agreements askance. This can be readily seen by comparing Section 558 of the Restatement of the Law of Contracts with Section 617 of the Restatement of Conflicts of Law. For a general discussion of the older law, see also Insurance Co. v. Morse, 20 Wall 445, 87 U.S. 445, 22 L. Ed. 365; 45 Yale Law Journal 1150; 22 Cornell Law Quarterly 456; 6 Corbin on Contracts, Section 1445.

(2) However, we accept the conclusion of Judge L. Hand stated in his concurring opinion in the Krenger Case, supra (174 F. 2d 561), viz:

'In truth, I do not believe that, today at least, there is an absolute taboo against such contracts at all; in the words of the Restatement (of Contracts, Section 558) they are invalid only when unreasonable; and Mittenthal vs. Mascagni (183 Mass. 19, 66 N.E. 425, 60 L.R.A. 812), is a notable instance in which a contract in futuro was held 'reasonable'. What remains of the doctrine is apparently no more than a general hostility, which can be overcome, but which nevertheless does persist.'

From this it follows that in each case the enforceability of such an agreement depends upon its reasonableness."[8]

The District Court below found the agreement to adjudicate claims for cargo damages in Genoa, Italy was not an unreasonable one and thus enforced the agreement made between the parties to litigate in that forum. The respondent here was amply protected from any unjust or unreasonable results by the careful consideration of the District Court below of the question of the reasonableness of the agreement. Exercising its basic Admiralty jurisdiction

[8] 224 F. 2d 806, at page 807.

as requested by Petitioners, the District Court below in the exercise of its sound discretion determined that the agreement made by the Respondent to adjudicate these claims in Genoa was not an unreasonable one and thus directed specific performance of one of the contractual provisions covering the shipment.

That such an agreement in a bill of lading is not contrary to the public policy of the United States is clearly indicated by the approach to this matter taken by the Congress of the United States when it passed the United States Carriage of Goods by Sea Act in 1936[9] and ratified the Brussels Convention in 1935 and 1937.[10]

In passing the Carriage of Goods By Sea Act, Congress did not see fit to declare such agreements as this to be invalid and the Act contains no grant of jurisdiction to any particular courts nor does it contain any provisions relating to venue. In discussing the effect of the Congress not having included some specific grant of jurisdiction to the courts of the United States, the Court of Appeals for the Second Circuit in the *Muller* case expressly pointed out that such agreements were not contrary to the Carriage of Goods by Sea Act saying in part:

> "It will be noted at the outset that this section does not[11] expressly invalidate the jurisdictional agreement contained in the bill of lading here involved. Nor, we

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[9] 46 U.S.C. 1300 ff.

[10] Knauth on Ocean Bills of Lading (4th Ed., 1953) at pages 77-85.

[11] Refers to section 3(8) of the U. S. Carriage of Goods by Sea Act, 46 U.S.C.A. 1303 (8).

hold, may the Act [12] properly be interpreted to invalidate such agreements. It is perhaps worth noting that the present Australian Carriage of Goods by Sea Act does declare provisions of the sort here involved to be null and void. Formerly the Canadian Act did likewise. Knauth on Bills of Lading, p. 238. We think that if Congress had intended to invalidate such agreements, it would have done so in a forthright manner, as was done in the Canadian Act of 1910. The Carriage of Goods by Sea Act contains no express grant of jurisdiction to any particular courts nor any broad provisions of venue: in this respect it differs from the Federal Employers' Liability Act which was involved in Krenger v. Pennsylvania R. Co., 2 Cir., 174 F. 2d 556. On that account, as indeed in other respects, this case must be distinguished from that. Certainly the clause here involved is not one necessarily 'relieving the carrier or the ship from liability.' "[13]

The Carriage of Goods by Sea Act is, of course, a direct indication by the Congress of the United States that it did not intend to invalidate such agreements, for as the Court of Appeals for the Second Circuit pointed out had Congress intended that such an agreement to adjudicate claims in foreign countries would be null and void as the Court of Appeals below held, this could have easily been taken care of by an express provision in the Act as it had been done by the legislative bodies of Australia and Canada in enacting their Carriage of Goods by Sea Acts. It is therefore of particular significance that a provision invalidating agreements to adjudicate claims in courts outside the U. S.

[12] Refers to U. S. Carriage of Goods by Sea Act, 46 U.S.C.A. 1300 ff.

[13] 224 F. 2d 806, at page 807, cert. denied 350 U.S. 903 (1955).

was not included in the United States Carriage of Goods by Sea Act by the Congress of the United States.[14]

We firmly believe that this was not an unintentional omission by the Congress of the United States in passing the Carriage of Goods by Sea Act, for the legislative history shows notably that Congress was aware of possible litigation in both American and foreign courts [14a] but that Congress was striving for substantial uniformity with similar acts of other great maritime countries when it enacted the U. S. Carriage of Goods by Sea Act. Such uniformity required no provision invalidating agreements to adjudicate claims in courts outside the United States for only Australia and Canada had such provisions in their Acts and Canada was in the process of repealing that provision in its Carriage of Goods by Sea Act at approximately the

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[14] The legislative history of the U. S. Carriage of Goods by Sea Act shows clearly that Congress was well aware of similar Acts in many other countries including Australia and Canada. See the repeated references to the need for uniformity and to the Carriage of Goods by Sea Acts of many other countries or to said countries having ratified the Brussels Convention in H. R. Rep. No. 2218, 74th Cong., 2d Sess. (Jan. 28, 1936), **Hearings Before the House Committee on Merchant Marine and Fisheries on S. 1152, Uniform Ocean Bills of Lading;** S. Rep. No. 742, 74th Cong. 1st Sess. (1935), **Hearings Before the Senate Commerce Committee on S. 1152, a Bill Relating to Carriage of Goods by Sea,** 74th Cong. 1st Sess. 1935, particularly at pages 18, 20, 77. The Acts of other countries were matched so closely that even clerical errors were corrected as is shown on page 3 of the Senate report.

[14a] The House Report in quoting from the Senate Report states: "This legislation supplements the convention in that it makes the convention provisions surely applicable to all carriers engaged in American trade when they are before American courts". This indicates that both the House and the Senate contemplated litigation of claims such as this in both American and foreign courts. See H. R. Rep. No. 2218, 74th Cong. 2nd Sess. (1936) at page 4.

same time that Congress was passing the United States Carriage of Goods by Sea Act.[15]

But Congress undoubtedly had an even stronger reason than uniformity for omitting any provision granting exclusive jurisdiction to the courts of the U. S.—and that simply was to encourage, in every way that it could, American shippers to ship their goods on vessels in the American Merchant Marine. Such encouragement would serve a two-fold purpose—it not only would help to insure an adequate Merchant Marine quickly convertible to war time use in an emergency, but it would also serve to reduce the amount needed in governmental subsidies to American steamship companies.

The position Respondent now finds itself in in this case will undoubtedly encourage it in the future, if indeed it has not already done so, to ship its goods on American vessels. If living up to its contractual agreement to litigate this case in Genoa, Italy is as distasteful to Respondent as it has made it out to be in these proceedings, we have no doubt that whenever possible it will ship its goods on American vessels where it has a choice as it did in this case. As the record reflects, at least one wholly owned American steamship company, Lykes Bros. Steamship Co., Inc., maintained a regular service with vessels sailing from United States Gulf ports to the ports in Italy involved here each two weeks at precisely the time Respondent was shipping its goods on Petitioner's vessel. If Respondent had wanted to insure that its cargo claims, if any, would have been litigated in the United States, its choice was very simple—

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[15] As Schedule to Canadian Water Carriage of Goods Act of June 23, 1936, repealing Act of 1910.

simply ship on American flag vessels which provide for adjudication of claims such as this in the courts of the United States in their bills of lading.

It is respectfully submitted that public policy requires that everything be done that will best serve the interests of this county and its citizens. Without question, these interests are best served by encouraging American shippers to ship with vessels in the American Merchant Marine, already heavily subsidized by the United States Government for its very existence.

To permit an American citizen who has elected to use a foreign vessel on which to make its shipments to ignore its contractual agreement with that foreign vessel to litigate any claims it might have in Italy would only serve to encourage American shippers to ship on foreign flag vessels. On the contrary, however, if full effect is given to the agreement in Clause 27 of the bills of lading in this case and the Respondent relegated to the courts of Genoa to which it freely assented, it will undoubtedly serve as a substantial impetus to American shippers to ship their goods aboard American flag vessels in order to insure that any claims for damage to their shipments will be adjudicated in this country.

With the Congress not having declared agreements such as this contrary to public policy, and it clearly appearing that public policy would best be served by encouraging American shippers to ship aboard American vessels, it is respectfully submitted that any declaration that such agreements are invalid as being contrary to public policy should come from the Congress and not from the courts. Particularly is this true when the possible international im-

plications such a decision will have on our world trade and when the disrupting effect it will have upon the uniformity of international maritime law are carefully considered.

AGREEMENT TO LITIGATE CLAIMS IN ITALY WAS A REASONABLE ONE

If the agreement to adjudicate claims for cargo in Genoa is not null and void because contrary to public policy as the Court of Appeals below held, then the agreement of the parties must be given effect if the agreement is a reasonable one.

While the Court of Appeals below attempts to distinguish on the facts the holdings of the Court of Appeals for the Second Circuit in the *Muller* case,[16] *The Geisha* case[17] and *The Bio Bio* case,[18] a comparison of the factors which led the Court of Appeals for the Second Circuit to enforce the agreements to adjudicate the claims in foreign countries as reasonable in its three cases demonstrates clearly that the factors involved in this case are substantially the same. A comparison of the decisions in the three cases from the Court of Appeals for the Second Circuit with the facts of this case indicates quite clearly that the only reasonable forum for the adjudication of this controversy is a court in Genoa, Italy. When the factors indicating the reasonableness of the present agreements are considered, the so-called distinguishing factors

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[16] 224 F. 2d 806 (2 C.A.), cert. denied, 350 U.S. 903 (1955).

[17] 187 F. 2d 990 (2 C.A., 1951).

[18] 227 F. 2d 519 (2 C.A., 1955), aff. 127 F. Supp. 13 (S.D. N.Y. 1955).

advanced by the Court of Appeals below in its attempt to distinguish this case from the three decisions of the Court of Appeals for the Second Circuit pale into insignificance. For the Court's convenience, these factors are set out at length in the footnote below.[19]

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[19] These factors are:

1. The vessel is owned by a Genoese corporation and its operations are directed therefrom. All records of the corporation relating to the vessel and its cargo are located there.

2. The vessel's crew are Italians, residing in Italy, and as possible witnesses, have no expectation of being in the United States at the time of trial. Since the voyage referred to in the Libel, the Captain of the vessel, patently an indispensable witness, has suffered a heart attack and is no longer aboard the vessel. No information is available in the record as to the whereabouts of other crew members or even whether they are still in the employ of Petitioner. Employment as a member of the crew of a vessel is characteristically transitory in nature, and certainly it is only the rankest kind of speculation to say that one or any of the MONROSA's foreign crew were aboard at the times mentioned and certainly it cannot be expected that they would be present at the time of trial in the United States where their oral and obviously more effective testimony could be obtained. This is true notwithstanding the fact that the MONROSA and other of the Petitioner's ships on occasions call at Gulf ports with crews aboard. At any rate, the MONROSA's crew is Italian and it resides in Italy and the obvious benefit of this factor and the probability that they would be available at the time of trial in Genoa is apparent. Certainly, their presence would be more desirable to a court than deposition testimony.

The fact that deposition testimony could have been obtained from the MONROSA's crew in April or in September of 1956 (assuming the personnel other than the Master was the same) should not influence the decision in this case, since the District Court ruled that Respondent who served notice for the taking of depositions two days after the filing of the Libel with no advance notice was not entitled to this deposition testimony when it was sought. In this connection, the District Court ruled after hearing oral argument that the notices to take depositions had to be vacated; first, because discovery depositions are not author-

It is clear from a consideration of these factors that the finding of the District Court below that the agreement

ized in admiralty, and second, because depositions **de bene esse** cannot be taken before issue is joined. The Libel had been filed only two days before the notices of depositions were served and no responsive pleading was due for more than nine days after the depositions had been noticed. In any event, it would have been quite unjust to permit the depositions when Petitioner's counsel did not have, and could not obtain from Italy, full information on the facts of the case before the depositions were scheduled.

It is entirely possible that Respondent was not primarily concerned with obtaining the testimony of these witnesses on the merits of the claim, but, on the contrary, to attempt to bolster its contentions in opposition to Petitioner's motion to decline jurisdiction in an effort to avoid the agreement it had previously made to adjudicate claims in Genoa, Italy.

3. Of the four Italian ports listed where the carbon black was destined, Genoa was the first port reached by the SS MONROSA and it was there that all of the cargo that was capable of being delivered was discharged, the remainder being damaged to such an extent that it could not be delivered to the other Italian ports. Therefore, it was at Genoa, the place agreed upon for the adjudication of any cargo damage claims in the bills of lading, where the cargo was discharged and surveyed, the damages segregated and the condition of the cargo noted, not only by Petitioner's representatives but by Respondent's representatives as well.

4. Clause 8 of the bills of lading provides that in the event of claims for short delivery and damage, the value of the cargo shall be determined as of its market value at the port of destination on the day of the vessel's arrival in the Italian port (Genoa). Accordingly, testimony as to the market value will have to be obtained exclusively in Genoa, Italy. This measure of damages (the value of the cargo at the port of destination on the date of its arrival) is the same measure as applied in courts of admiralty in the United States.

5. The Libel alleges damages to the cargo by seawater. Accordingly, the seaworthiness of the vessel before, at the beginning of, and during the course of the voyage will be one of the main

to adjudicate cargo claims in Genoa, Italy was not an unreasonable one is amply supported by the record. It must be accepted here unless there was a clear abuse of the

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issues in this case. All repairs and surveys of the vessel, both before the voyage in question and following its completion, were performed in Italy, and therefore all evidence and testimony regarding the inspections, repairs and seaworthiness in general will be available to the Italian Court in Italy, and not here. Testimony respecting the seaworthiness of the hull of the SS MONROSA when it departed Houston and New Orleans is primarily obtainable from Italian surveyors and from the crew of the SS MONROSA, since no complete hull survey of the MONROSA's cargo holds were made by American surveyors at Houston and New Orleans prior to the vessel's departure on the voyage in question.

Petitioner has the burden of showing that it used due diligence to make the vessel seaworthy when the cargo was loaded in Houston and New Orleans, but while there may be some testimony on this issue available in Houston and New Orleans, the vast majority of it will have to come from the ship's crew, from the vessel's records in Italy and from Italian surveyors who had made periodic checks of the vessel's hull prior to this voyage and subsequent thereto.

6. General Average has been declared in Italy and all computations required in the adjudication thereof is being accomplished in Italy. Whether this is a general average situation or not is a matter that also must be resolved possibly by litigation in Italy.

7. Respondent did not have to accept the agreement to adjudicate the claims in Genoa because of economic duress because Lykes Bros. Steamship Co., Inc., among other United States steamship lines, maintains regular services to these same Italian ports with vessels sailing from the Gulf to such ports each two weeks. (R. 30-31). Thus, had Respondent objected to the agreement in the Petitioner's bills of lading, its shipment could have been made on an American vessel whose bills of lading do not contain such clauses agreeing upon a foreign forum for litigation of disputes arising out of damage to the cargo. In these days of substantial subsidies to American steamship lines, it would seem desirable to help them meet foreign competition by encouraging American citizens to use American ships and thus avoid having to file damage claims in foreign countries while at the same time bolstering our American Merchant Marine.

District Court's discretion or unless it is clearly erroneous.[20] Even the Court of Appeals below would not go so far as to hold that the District Court had abused its discretion in sustaining the reasonableness of the forum agreed upon by the parties or that such holding was clearly erroneous.

The most that can be said in Respondent's favor on this phase of the matter is that there may be some elements present in the case which would make it desirable from Respondent's standpoint for the case to be litigated in the United States. However, if the agreement is not null and void as contrary to public policy as the *Muller*[21] case, *The Geisha* case,[22] and *The Bio Bio* case[23] clearly hold, it is also clear from these three cases that the reasonableness of the agreement is the sole criterion. The fact that Respondent may show some elements which indicate convenience to it of trial at a place other than the agreed upon forum is irrelevant and immaterial in the face of the showing made here that the forum to which the Respondent freely assented is not an unreasonble one. The agreement to adjudicate claims in Genoa was properly enforced by the District Court below where the record before it spoke authoritatively for the reasonableness of the agreement and it is significant to note that nowhere

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[20] "In reviewing a judgment of a trial court sitting without a jury in Admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52 (a) of the Federal Rules of Civil Procedure". **McAllister v. United States**, 348 U.S. 19, 20 (1954).

[21] 224 F. 2d 806 (2 C.A.), cert. denied, 350 U.S. 903 (1955).

[22] 187 F. 2d 990 (2 C.A., 1951).

[23] 227 F. 2d 519 (2 C.A., 1955), aff. 127 F. Supp. 13 (S.D. N.Y. 1955).

in its briefs before the District Court below or the Court of Appeals below was the Respondent ever able to bring itself to make the direct statement that the agreement was, in fact, an unreasonable one. In good conscience it could not make such a statement.

It is clear, therefore, under all of the facts and circumstances of this case, that the District Court below did not abuse its discretion in exercising its basic Admiralty jurisdiction and enforcing the agreement made by Petitioners and Respondent to adjudicate claims for cargo damage such as this in the forum to which they freely agreed.

CLAUSE 27 INCLUDES SUIT IN REM AGAINST THE VESSEL

The second ground relied on by the Court of Appeals below in reversing and remanding this cause to the District Court was its holding that Clause 27 of the Bills of Lading covering the transportation of this cargo did not include *in rem* actions against the vessel itself as well as *in personam* actions against the Petitioner. This holding of the Court of Appeals below in separating the *in rem* and *in personam* nature of relief permits the Respondent to avoid its clear and unambiguous contractual agreement with respect to *in personam* actions under the guise of an independent *in rem* proceeding which thereby abrogates completely the effects of its contractual agreement to adjudicate any claims for cargo damage in Genoa, Italy.

Clause 27 states:

> "Also, that *no legal proceedings may be brought* against the Captain or shipowners or their agents in respect to loss of or damage to any goods herein

> specified, except in Genoa, it being understood and agreed that every other tribunal in the place or places where the goods were shipped or landed is incompetent, *notwithstanding that the ship may be legally represented there.*" (Emphasis supplied)

It is the clear and obvious intent of Clause 27 of the bills of lading to effect a complete jurisdictional agreement regarding any dispute arising out of the loss or damage to the cargo while carried on Petitioner's vessel. Certainly this clause contemplates all claims, suits and causes of action when it refers to legal proceedings for loss or damage and specifically mentions the possibility of the "ship" being legally represented there. Actually it is as least as strong, if not stronger, than the clauses in the three leading cases on this question.

In the *Muller* case, the agreement to adjudicate claims in a foreign country read as follows:

> "'Jurisdiction. Any claim against the *carrier* arising under this bill of lading shall be decided according to Swedish law, except as provided elsewhere herein, and in the Swedish Courts, to the jurisdiction of which the *carrier* submits himself.'"[24]

And in *The Geisha*, the contractual agreement passed upon provided:

> "'Any claim under this bill of lading including *claims* for alleged unseaworthiness . . . to be settled with the *company* in Norway, according to Norwegian law, to the exclusion of proceedings in the courts of any other country . . .'"[25]

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[24] 224 F. 2d 806, at page 807, cert. denied 350 U.S. 903.

[25] 187 F. 2d 990, at page 990.

And finally, in *The Bio Bio*, the clause was:

> "'Any *claims* in connection with the goods carried under the bill of lading must be filed against the *carrier* in the City of Stockholm and settled according to Swedish law . . .'"[26]

Thus, the reference in all three of these cases was either to carrier or company and no specific references were considered necessary by these Courts to the vessel itself, for obviously the clear intent of these jurisdictional agreements is to litigate all legal proceedings, whether *in personam* or *in rem* in the agreed-upon forum.

While, as the Court of Appeals below points out, the *Muller* case[27] apparently did not involve a libel *in rem* because the vessel was lost at sea, the even later decision of the Court of Appeals for the Second Circuit in *The Bio Bio* case involved both a proceeding *in rem* against three vessels and *in personam* against their owners.[28] The agreement in *The Bio Bio* case referred solely to claims against the "carrier" and provided that suits against the carrier could be brought only in the courts of the City of Stockholm, Sweden. A comparison of the agreement in the present case with the agreement in *The Bio Bio* case indi-

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[26] 127 F. Supp. 13, at page 14, affirmed per curiam, 227 F. 2d 519.

[27] 224 F. 2d 806 (2 C.A.), cert. denied 350 U.S. 903 (1955).

[28] The District Court's opinion in the **Bio Bio** case shows clearly that the respondents did not question either **in rem** or **in personam** jurisdiction for it states: "Respondents do not question, upon appearance and oral argument or in brief, the jurisdiction of this court either over their persons . . . or the subject matter of this controversy." 127 F. Supp. 13, at page 14.

cates clearly both clauses were intended to cover legal proceedings of any kind in connection with cargo damage.[29]

Clearly the term "carrier" used in *The Bio Bio* case is a reference to the company owning the vessel, the shipowner, and by definition, a carrier is "a person or corporation undertaking to transport person or property from place to place, by means of conveyance, either gratuitously or for hire".[30]

Nevertheless, even though the clause under interpretation in *The Bio Bio* case made no reference whatsoever to *in personam* or *in rem* actions and did not even mention the vessel or the ship, the Court of Appeals for the Second Circuit correctly interpreted this clause to include any action which might be asserted against the shipowner, whether *in personam* or *in rem*.

Isn't the above quoted definition of a carrier in fact the definition of a shipowner if you change the word "conveyance" in the definition to "ship". The definition of shipowner and carrier for all practical purposes is synonymous under these circumstances. Thus, the Court of Ap-

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[29] In **The Bio Bio** case the agreement was:

"Any claims in connection with the goods carried under the bill of lading must be filed against the carrier in the City of Stockholm and settled according to Swedish law. . . . "

Clause 27 of the bill of lading involved here provided as follows:

"Also, that **no legal proceedings may be brought** against the Captain or shipowners or their agents in respect to loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other tribunal in the place or places where the goods are shipped or landed is incompetent, **notwithstanding that the ship may be legally represented there.**" (Emphasis supplied).

[30] Black's Law Dictionary (3d Ed., 1933).

peals below in narrowly construing Clause 27 of the bills of lading completely ignored the clear and obvious intent of the clause, an intent clearly evident to anyone familiar with the nature of ocean transportation.

The decision of the Court of Appeals below refusing to uphold the agreement of the parties both *in rem* and *in personam*, of necessity divorces entirely one form of proceeding from the other, and in so doing is contrary to the decision of the Court of Appeals for the Third Circuit in *Smith v. The Mormacdale*, 198 F. 2d 849 (3 C.A., 1952), to a decision of the Court of Appeals for the Second Circuit in *Bennett v. SS Mormacteal, et al.*, 254 F. 2d 138 (2 C.A., 1958), (affirming per curiam 160 F. Supp. 840 (E.D.N.Y. 1958, petition for writ of certiorari filed June 11, 1958, No. 1063 and certiorari denied Oct. 13, 1958), and to an earlier decision of its own in *Samuels v. Munson Steamship Line*, 63 F. 2d 861 (1933).[31]

There is no explanation in the opinion by the Court of Appeals below of the basis for their holding that Clause 27 did not encompass all legal proceedings, both against owners of the vessel and against the ship itself. Such a construction

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[31] In these cases, longshoremen had filed actions **in rem** against the vessel only in an attempt to recover compensatory damages from the vessel **in rem**, when they could not recover such damages against the vessel owner **in personam** because the longshoremen were relegated to their rights under the Longshoremen's & Harbor Workers' Compensation Act against their employer, the vessel owner. In these cases, it is held that an action **in rem** against the vessel cannot be maintained since the vessel is not such a separate and independent person from the vessel owner as to make it a legal entity against which the longshoremen's claims can be asserted, because this would permit the longshoremen to recover indirectly compensatory damages from their employer, the vessel owner, when they could not recover them directly from their employer in an **in personam** action.

of this clause for all practical purposes renders it a nullity by interpretation, for to permit Respondent to prosecute its cause of action against the ship *in rem* and on the other hand to uphold the agreement requiring Respondent to sue the shipowner *in personam* in Genoa is simply to permit Respondent to circumvent its agreement by extending the fiction of the separate identity of a vessel to never intended extremes. The existence of an *in rem* action against a vessel itself is merely a security device in a cause of cargo damage by which Respondent became entitled to a seizure of the vessel until adequate security was posted to satisfy its cause of action, wherever it might be prosecuted. There is nothing in the *in rem* seizure device or in Clause 27 which says that the case must be prosecuted in the same jurisdiction where the vessel is seized or subject to seizure. The fact that the right exists at all to pursue the vessel *in rem* is simply to permit Respondent to get its full security and this was accomplished when the District Court below, in granting Petitioner's motion, conditioned the order upon the Petitioner's posting a corporate surety bond to remain in full force and effect should Respondent be successful in obtaining a favorable award in a proceeding in Genoa, Italy, the forum where it had agreed to bring all legal proceedings in respect to loss of or damage to goods covered by the bills of lading.

Since Respondent has the full security demanded by it through the corporate surety bond posted by Petitioners which remains in full force and effect, it has accomplished all that it could hope to do by an action *in rem* against the MONROSA except to evade its contractual agreement to institute any legal proceedings to recover for this cargo loss in Genoa, Italy. All Respondent is trying to do here

is to avoid living up to its contractual agreement, which now appears to it to have been an unwise one.

Clause 27 clearly encompasses all legal proceedings whether *in personam* or *in rem* and the District Court below was correct in so holding.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals should be reversed, and that of the District Court below reinstated, thus requiring Respondent to abide by its contractual agreement by prosecuting the suit now pending in Genoa against Petitioner, if Respondent so desires.

Respectfully submitted,

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SUPREME COURT. U. S.

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No. 178

IN THE

Supreme Court of the United States

October Term, 1958

SS MONROSA, HER ENGINES, TACKLE, ETC., AND NAVIGAZIONE ALTA ITALIA, *Petitioners*

-versus-

CARBON BLACK EXPORT, INC., *Respondent*

ON WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

While Petitioners do not desire to unduly burden the Court with a lengthy reply brief, we feel that certain comments may be of benefit to the Court, particularly in view of the large number of cases cited for the first time by the Respondent, substantially all of which will be of no real assistance to this Court in considering the questions before it.

For convenience, we shall treat the arguments of the Respondent in the order in which they appear in Respondent's brief.

Reply to Respondent's Argument I
(Respondent's Brief, Pages 11-21)

In support of its contention that the agreement to assert the claim in Italy is void because contrary to public policy, Respondent first cites and quotes from three decisions of this Court, none of which involved anything closely approaching the present agreement to litigate claims for cargo damage in the Courts of Genoa, Italy.

In one of these cases, *The Kensington*,[1] the Court was considering not the validity of an agreement to adjudicate claims in an agreed upon forum, but rather, whether a carrier could limit its liability by printed provisions on its baggage ticket. So far as the opinion reveals, there was no question of an agreement between the parties as to the place where the claim for damage or loss to the baggage was to be made. The case deals solely with the validity of the exemptions from liability on the baggage ticket, and does not in any way purport to say that the public policy of the United States forbids agreements to litigate claims in a particular forum.

The other two decisions of this Court relied on by the Respondent, the *Morse*[2] and *Terral*[3] decisions, both involved State Statutes which compelled a foreign corporation doing business in that State to agree to waive its rights to

[1] 183 U.S. 263 (1902).

[2] 87 U.S. 445 (1874).

[3] 257 U.S. 529 (1922).

resort to the Federal Courts in return for the privilege of doing business in that State. It is easy to understand that the public policy of the United States would prohibit any such unconstitutional exactions by the various States since to approve such State Statutes would in effect give to the legislatures of the various States in many areas complete control over the jurisdiction of the Federal Courts in those States. It would in effect permit the State Legislatures to take away the jurisdiction of the United States District Courts within their boundaries.

But this attempted exaction of a State Legislature in return for the privilege of doing business in that State, an exaction which required a blanket waiver for any and all times and for any and all controversies and on any and all occasions of a corporation's rights to resort to the Federal Courts, is a far cry from the agreement made between Petitioners and Respondent with respect to this shipment of carbon black upon a single voyage of the vessel. The agreement involving this cargo relates to this carriage and this carriage alone, and does not amount to a blanket acceptance of such an agreement by Respondent for all times and as respects all controversies for all time such as was attempted by the State Legislatures in the *Morse* and *Terral* cases.

In an attempt to bolster its contention that the agreement in this case is contrary to public policy, and for the first time in this litigation, Respondent next cites cases from twenty State jurisdictions which supposedly support Respondent's contention that the agreement in this case is void as contrary to public policy.

In the cases cited from eight of the States, the decisions turn on the fact that the venue of the action is specifically

controlled by a State Statute,[4]—that is, the legislature had specifically declared the public policy of that State to require venue in a certain county and under such a situation the parties could not change it.

Four of the cases cited from the States are not in point.[5] Only six of the twenty cases cited from the various States in fact give any support to Respondent's contention,[6] and in one of these a subsequently enacted State statute setting the public policy led to the result,[7] and in still another the decisions are not uniform.[8]

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[4] Arizona, California, Idaho, Missouri, North Carolina, Oregon, Texas, and West Virginia.

[5] Arkansas—**Standard Pipe Line Co. v. Burnett,** 188 Ark. 491, 66 S.W. 2d 637 (1933)—Did not involve agreement to assert claims in specific forum but was attempt by Arkansas employee of Louisiana Corporation to agree to accept compensation benefits under Louisiana Act and waive all his rights under Arkansas law which agreement was void under Arkansas statute.

Maine—**Bartlett v. Union Mutual Fire Ins. Co.,** 46 Me. 500 (1859)—Court simply held that having failed to perform other contract provisions, defendant could not rely on the provision in contract fixing the forum.

Minnesota—**Detwiler v. Lowden,** 198 Minn. 185, 269 N.W. 367, 269 N.W. 838 (1936)—This was Federal Employer's Liability Act case and turned on fact Congress had set policy on venue of such actions.

Rhode Island—**Pepin v. Society St. Jean Babtiste,** 23 R.I. 81, 49 A. 387 (1901)—Was not an agreement as to a forum but an agreement not to resort to any court which was held void.

[6] Connecticut, New York, Illinois, Iowa, Massachusetts, and Pennsylvania.

[7] Iowa—**Field v. Eastern Building & Loan Association,** 117 Iowa 185, 90 N.W. 717 (1902).

[8] Massachusetts—See **Daley v. People's Building, Loan & Savings Association,** 178 Mass. 13, 59 N.E. 452, and **Mittenthal v. Mascagni,** 183 Mass. 19, 66 N.E. 425.

The decision from the State of Washington cited by Respondent holds that parties cannot contract to bypass administrative remedies,[9] but two other decisions of the Supreme Court of Washington clearly hold that parties can contract with respect to the place of venue or jurisdiction.[10]

In addition to the cases from the State of Washington, the Courts of the States of Alabama,[11] Montana[12] and Wisconsin[13] also hold that contracts fixing venue or jurisdiction are valid and enforceable.

The Respondent next cites thirteen cases[14] from various Federal Courts supposedly in support of its argument that the agreement here is void as contrary to public policy, when in fact only three of them had such a question before the Court for determination and held them void because contrary to public policy.[15] In all three of these cases, it does not appear that the question of the reasonableness of the agreement was ever urged or con-

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[9] **Washington Local Lines v. International Brotherhood,** 183 P. 2d 504, 28 Wash. 2d 536.

[10] **State v. Court of King County,** 61 Wash. 681, 112 Pac. 927; **McVicar v. Peters,** 11 Wash. 2d 678, 120 P. 2d 484.

[11] Alabama—**Brown v. Alabama Chemical Company,** 207 Ala. 215, 92 So. 260 (1922).

[12] Montana—**Electrical Products Consolidated v. Bodell,** 816 P. 2d 788 (1957).

[13] Wisconsin—**State Ex Rel Kuhn v. Luchsinger,** 231 Wis. 533, 286 N.W. 72, 75 (1939).

[14] Respondent's brief, pp. 17, 18, and 19.

[15] **The Edam,** 27 F. Supp. 8 (S.D. N.Y. 1938).
The Ciano, 58 F. Supp. 65 (E.D. Pa. 1944).
Gough v. Hamburg Amerikanische, 158 F. 174 (S.D. N.Y. 1907).

sidered. The other ten cases cited are either not in point or clearly distinguishable as follows:

1. *United States v. Leahy*, 148 F. 2d 462 (3 C.C.A. 1945). This involved only a question of whether the United States District Court or the United States Court of Claims had jurisdiction. Jurisdiction having been specifically granted by the Congress to the United States District Courts, in providing for the suit against the Government, the Court held that the Court of Claims in fact had no jurisdiction. No question was presented to the Court of an agreement to assert the claim in the Court of Claims by contract.

2. *United Fuel Gas Company v. Columbian Fuel Corporation*, 165 F. 2d 746 (4 C.C.A. 1948)—While the Court by dictum says that "Parties cannot by contract oust the Federal Courts of their statutory jurisdiction", in the very same sentence the Court also says "there is nothing in the contracts themselves which attempts to do this." (At page 749). The question of the validity of any such agreement in the contract, therefore, was not even before the Court for its consideration.

3. *Burt v. Isthmus*, 218 F. 2d 353 (5 C.A. 1955) —The Court's decision here was not predicated on any grounds of public policy but on the ground that it would be unreasonable to compel the plaintiff to litigate the matter in Mexico as provided by the contract, particularly since one of the most important, if not the basic issue in the lawsuit, was whether or not the negotiations between the plaintiff and the defendant in fact culminated in the contract which

contained the agreement to litigate matters in the Courts of Mexico. Thus, the very existence of the contract in which the agreement was made was a basic issue in the action, and this, together with the unreasonableness of the agreement, was the primary basis on which the Court of Appeals for the Fifth Circuit declined to enforce the agreement.

4. *Columbia Casualty Company v. T. E. Mahaney*, 229 F. 2d 848 (5 C.A. 1956)—This case was cited by Respondent either in error or in an attempt to cite more cases than it thought the Court or Petitioner's counsel could read, for this case does not even remotely touch the Respondent's contention. This was a case by a plaintiff seeking a recovery under a voluntary compensation policy, and the sole claim made by the defendant at the time was that the policy had been voided by the plaintiff's suit for attorneys fees and interest in addition to compensation benefits. The Court simply held that the plaintiff had sued for voluntary compensation benefits and it was up to the Court to set the amount thereof. Nothing whatsoever in this case is in any way related to an agreement as to venue or jurisdiction.

5. *Akerly v. New York Central Railroad Company*, 168 F. 2d 812 (6 C.C.A. 1948)—This was a Federal Employer's Liability Act case in which a railroad worker had agreed in return for some advances to litigate his claim only in one of the possible forums provided by the Congress. The Court held that Congress having fixed the venue for such actions in one of several places, the Railroad worker could not by contract agree to a specific venue.

6. *The Neck*, 138 Fed. 144 (N.D. Wash., 1905).—This case involved an American seaman who had signed on board a German vessel. He sued for certain wages allegedly due and the defendant shipowner contended that a treaty requiring the adjudication of claims between a seaman and the shipowner before a German Consul required the dismissal of the action. The Court declined to dismiss the action, holding that the Plaintiff was not a member of the crew within the meaning of the treaty, so that in fact the controversy was not one between the Captain and a member of the crew as required by the treaty. The case did not involve an agreement between the plaintiff and the defendant with respect to a forum for the resolution of their differences.

7. *The Falls of Keltie*, 114 Fed. 357 (N.D. Wash., 1902)—This suit was by a seaman on a British vessel seeking an interpretation as to the period of time required to continue in the service of the vessel. There was nothing at all in the shipping articles which indicated that any such disputes had to be submitted to any particular forum. The case simply does not involve a question related to the present case.

8. *Jefferson Insurance Company v. Cia. Colonial de Navegacao, et al.*, 121 F. Supp. 828 (S.D. N.Y. 1954)—This case involved a motion of the defendant steamship company to decline jurisdiction because of the bill of lading provision providing for suit in Portugal. The Court simply held that no injustice would result by retaining the suit in New York and so far as the opinion shows, there was no showing at all that the agreement in the bill of lading was a reasonable one with respect to that particular shipment.

9. *Latimer v. S/A Industrias Reunidas F. Matarazzo*, 91 F. Supp. 469 (S.D. N.Y. 1950)—This suit involved a controversy between an American citizen and a Brazilian corporation with respect to an employment contract. Contract was to be performed in South America but apparently there was no clause in the contract requiring that any actions arising out of it be asserted in South America. The motion of the defendant related only to the doctrine of forum non conveniens and did not involve a contractual agreement between the parties with respect to the place of litigation. The Court did recognize the right of an American court to decline to accept jurisdiction when to do so would offend traditional notions of fair play and substantial justice.

10. SS JOHN GORTHON, 1949 A.M.C. 1158 (E.D. La., 1949)—While this case involved a clause in a bill of lading providing for litigation in a foreign country, the Court's decision does not in fact reveal the basis on which the motion to decline jurisdiction was denied. All the Court did in its opinion was to quote the contentions of the libellant and the respondent and on what basis the Court declined to enforce the agreement in the bill of lading is nowhere indicated in the opinion. It is thus of no assistance to us here.

Thus, Respondent persists in its present brief in the same basic error made by the Court of Appeals for the Fifth Circuit, it treats the agreement of the parties as one ousting the Court of jurisdiction. It is not in fact such an agreement, but rather is one in which the basic jurisdiction of both the United States and Italy is recognized but in which the parties by contract have agreed that one forum will determine any controveries between them.

As such, it is not unlike the agreement of an automobile driver to subject himself to the jurisdiction of the Courts of a State other than his residence in which he operates his automobile. In both his home state and the other state, the Courts have jurisdiction, but by agreement, that is by operating his automobile on the highways of another state, the citizen agrees that actions arising out of his use of that automobile may be litigated in the other state, as well as in his home state.[16]

That the agreement in this case did not oust the District Court of jurisdiction is obvious in view of the bond required by the District Court to protect Respondent's security which still remains on file and in full force and effect. It can only be terminated upon the final adjudication of the suit filed by Respondent in Genoa, Italy, the agreed upon forum. (R. 37).

Reply to Respondent's Argument II
(Respondent's Brief, Pages 21-25)

Respondent's argument here is in fact simply the contention that the agreement in the bill of lading is invalid since it lessens the carrier's liability which admittedly would be in violation of the Carriage of Goods by Sea Act.

The two decisions of this Court relied on by the Respondent, the *Boyd*[17] and *Wilko*[18] cases, are clearly distinguishable, for both of those cases involved statutes in which Congress had made specific provision with respect to jurisdiction and venue. The Court in both cases simply

[16] **Hess v. Pawloski**, 274 U.S. 352 (1927).

[17] 338 U.S. 263 (1949).

[18] 346 U.S. 427 (1953).

held that Congress having fixed venue or jurisdiction, the parties could not contract it away. Of course, in the present case there is no expression from Congress at all with respect to venue or jurisdiction under the Carriage of Goods by Sea Act. The legislative history of the Carriage of Goods by Sea Act indicates clearly that Congress was aware of provisions relating to venue and jurisdiction in the Australian and Canadian Carriage of Goods by Sea Acts, but did not include in the United States Carriage of Goods by Sea Act any provision at all with respect to venue or jurisdiction.[19] As the Court of Appeals for the Second Circuit indicated in the *Muller* case, had Congress intended to invalidate such agreements it would have done so not by implication but in a forthright manner.[20]

Respondent expresses concern that if the agreement in this bill of lading is upheld, that a shipowner could so word its bill of lading as to ultimately leave American shippers or consignees without any redress for loss or damage to cargo.[21] This concern, of course, is without foundation, for this is the reason behind the requirement that such clauses as this be reasonable, and unless determined to be reasonable under the facts of a particular case, not enforceable. Respondent here in effect is concerned that American Courts will abdicate their judicial function and hold any such clause in a bill of lading to be enforceable without regard to the reasonableness of the forum. It is in fact an unfounded fear and an affront to the integrity of the American Judiciary. For this fear to be realized, we have to assume that American Courts

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[19] See footnotes 14 and 14a, page 17 of Petitioners' original brief.

[20] 224 F. 2d 806, at page 807, cert. denied 350 U.S. 903 (1955).

[21] Page 24, Respondent's Brief.

will not properly perform their judicial function. While Respondent obviously believes such an assumption is warranted, Petitioners, although foreigners, do not.

While Respondent would like to have this Court think that if it upholds the present agreement to litigate claims for this particular damaged cargo in Italy, it would be a blanket approval of all such clauses, this case involves, and the Petitioners seek, only a determination that such an agreement as this is valid if reasonable as it applies to each particular case.

But Respondent's real fears in this case apparently are pinpointed in its concern about the possible loss of a $1,000 claim, even though meritorious, because it would not be economically feasible to transport witnesses abroad.[21a] This presupposes that the shipowner is going to deny an otherwise meritorious claim simply because in dollars and cents it is small. The steamship business is one of the most competitive in the world today and it is this sharp blade of competition which will prevent any such results. But is it not a double-edged sword that cuts both ways? If an unscrupulous shipower would deny a meritorious $1,000 claim simply because the cargo owner could not afford to prosecute the action abroad, if the shoe were on the other foot, would not an equally unscrupulous cargo owner make such a jurisdictional agreement and then proceed to file a wholly unmeritorious claim for $1,000 in its own forum and attempt to force the foreign shipowners to honor that fraudulent claim simply because it would not be economically feasible for the foreign vessel owner to transport its witnesses to this country for a defense of it?

[21a] Page 24, Respondent's Brief.

Surely the law and the decision in this case must rest on something more than Respondent's fear that a foreign shipower is going to avoid its legal responsibilities under the contract of carriage. The law does not assume that someone will so avoid his legal obligations, in fact, the law assumes exactly the contrary.

Precisely the same contention, that such a clause was invalid because it lessens the carrier's liability, was made by the same attorneys who appear of counsel for the Respondent in this case in the *Muller* case, and it was expressly rejected by the Court of Appeals for the Second Circuit.[22]

Nor will Respondent's contention that the agreement in the bills of lading is a unilateral one and one which it had no choice but to accept withstand even casual scrutiny.[23] This contention could, of course, be argued with respect to each and every clause contained in the bills of lading, but, in fact, there was nothing whatsoever to compel Respondent to ship its cargo aboard this vessel or to prevent it from requesting that this clause be eliminated or changed. At least one wholly American-owned steamship company, Lykes Bros. Steamship Co., Inc., operates regular routes to these same ports in Italy with vessels departing each two weeks (R. 30-31). Almost without exception the vessels assigned to these regular routes to Italy call in both Houston and New Orleans for the receipt of cargo on each and every voyage as they pursue their liner service. Had Respondent really

[22] 224 F. 2d 806, cert. denied 350 U.S. 903 (1955).

[23] Page 25, Respondent's Brief.

been concerned about having to assert any claim it might have for cargo damage in an American Court, rather than in the Italian Courts as it agreed to do, there was certainly nothing to prevent it from arranging transportation on an American-owned vessel. Why then at this stage of the proceeding, with such a choice available to Respondent before it contracted, should Petitioners be required to defend Respondent's action for cargo damages at a patently inconvenient forum for the trial of the issues in this cause. The agreement was not forced upon Respondent against its will, but in fact was accepted without question when Respondent had readily available to it vessels that would have given Respondent the forum it now seeks.

Reply to Respondent's Argument III
(Respondent's Brief, Pages 25-34)

Respondent has finally been able to bring itself to openly contend that the agreement contained in the bill of lading is unreasonable. It is interesting to note that the case proceeded through the District Court and the Court of Appeals and through an application for a writ of certiorari before this Court before Respondent was ever able to bring itself to making such a statement. This alone indicates that even Respondent realized not only that the agreement was reasonable but that the decision of the District Court below that the agreement was not an unreasonable one in fact could not be seriously questioned.

On this phase of the matter, the question clearly is whether or not the District Court's finding was a clear abuse of discretion or clearly erroneous.[23a]

[23a] **McAllister v. United States**, 348 U.S. 19 (1954).

Even the Court of Appeals below would not go so far as to say that the District Court had abused its discretion or that its finding of the reasonableness of the agreement was clearly erroneous, but based its reversal on the grounds that the agreement was contrary to public policy and did not extend to *in rem* proceedings.

While most of Respondent's contentions in this phase of its brief are fully answered in Petitioner's brief,[24] a few comments seem appropriate here.

Respondent's brief would leave this Court with the impression that all Petitioners would have to do to establish the seaworthiness of the vessel would be to offer testimony of witnesses available in Houston and New Orleans since the cargo was loaded there.[25] In truth and in fact substantially all of the most persuasive evidence will be available only from witnesses and records who are readily available only in Italy. It is significant to note that the Carriage of Goods by Sea Act provides that "the carrier shall be bound, *before* and at the beginning of the voyage to exercise due diligence"[26] to make the vessel seaworthy.

Respondent contends that the beginning of the voyage was at Houston and New Orleans and implies that the burden of showing diligence to make the vessel seaworthy relates only to those two ports. While not admitting that Respondent is correct and that the beginning of the voyage in a situation such as this did not occur when the vessel left Italy on its outward leg of the voyage, Petitioners are willing to assume for the sake of argument

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[24] Pages 21 through 22 (footnote 19).

[25] Respondent's Brief, pages 27, 28.

[26] 46 U.S.C.A. #1303(1)(a) (Emphasis supplied).

that the voyage began at Houston and New Orleans as spondent contends. Even so, the Carriage of Goods by Sea requires that the diligence of the shipowner must be sho *before* and at the beginning of the voyage. Thus, burden is clearly upon the vessel owner to show dilige not only at New Orleans and Houston to make the ve seaworthy, but in fact prior to the commencement of voyage from its home port in Italy. Certainly Petitior would be delighted if on a trial their burden to sh diligence to make the vessel seaworthy was limited o to the proof of their actions in the Ports of New Orle and Houston, but we are confident that Respondent's a counsel would never overlook the requirement of Carriage of Goods by Sea Act that the owner's duty use diligence to make the vessel seaworthy exists *before* well as *at* the beginning of the voyage. This being Italian vessel with its home port in Italy, all of its perio inspections by the vessel's owner and surveys made connection therewith were made in Italy and all reco relating to the condition of the vessel are in Italy. To charge its burden of showing diligence to make the ve seaworthy, Petitioners undoubtedly will have to offer tailed evidence not only from the vessel owner's own p sonnel in Italy, but from the vessel's crew who reside Italy, from Italian surveyors who reside in Italy, and fr one or more shipyards and their records in Italy.

The burden of showing the vessel owner's diligence make the vessel seaworthy before and at the beginning the voyage is not simply a question of presenting a w ness or two from Houston or New Orleans as Respond implies. Substantially all of the most material and re vant evidence on this crucial issue will come not fr

witnesses in Houston and New Orleans, but rather from witnesses and documentary evidence which is readily available only in the agreed upon forum, in Italy.

We fail to see the relevance of Respondent's contention that this agreement should not be enforced because the Italian law prohibits such agreements.[28] The fact that the public policy of Italy has been specifically declared against such agreements apparently by an appropriate legislative body, does not mean that the public policy of the United States is the same without a legislative mandate. It does emphasize very strongly that with Congress not having made such a provision for exclusive jurisdiction in the United States, that it is a matter for the Congress to legislate on. Certainly no contention is made by Petitioners here that had Congress provided that such agreements were void, that the clause would be enforceable. The fact that it is specifically covered by an appropriate legislative enactment in Italy is of no significance here where we have no legislative enactment at all by the Congress except to the extent that the Italian legislation indicates clearly that it is a matter for the Congress and not for the Courts.

When Respondent's argument is considered on the question of the reasonableness of the agreement, it boils down to nothing more than the fact that there are some facts in this case which are different from the cases relied upon by Petitioners from the Court of Appeals for the Second Circuit. The question is not whether there are some

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[28] Respondent's brief, page 29.

different facts involved, but whether or not the Italian forum is a reasonable or convenient one. The facts indicate overwhelmingly that the forum in Italy is not only reasonable but is in fact the only convenient forum for litigation of the issues in this case. The most that can be said for Respondent's argument is that some of the proof will have to be obtained in the United States, but the vast majority of it with respect to the seaworthiness of the vessel and the nature, extent and amount of the damages which Respondent is entitled to receive if the vessel is liable will have to be, and can only be, obtained in Italy. Even Respondent's own witnesses on the nature, extent and amount of damages are in Italy. These are the crucial issues in the case, and the fact that the Courts of Genoa, Italy would be the most convenient forum in which to litigate such issues could be seen prior to the loading of the cargo when the agreement was made as readily as it can be seen now that damage has occurred.

Reply to Respondent's Argument IV
(Respondent's Brief, Pages 34-43)

Only a brief reply is indicated to Respondent's contention that if the agreement controls the *in personam* action, it does not include *in rem* actions against the vessel since Respondent has a maritime lien against the vessel for its loss and the vessel is a separate person from the owner. This Court has on two separate occasions branded such an argument as "like talking in riddles".

The latest such holding of this Court was in *Consumer's Import Co., Inc., et al. v. Kabushiki K. K. Zosengo, et al.*, 320 U.S. 249 (1943). This case involved the Fire Statute

which simply said "No owner shall be liable" for loss of cargo by fire on board a vessel "unless such fire is caused by the design or neglect of such owner."[29]

The cargo owners, whose cargo was damaged by fire, filed libels *in rem* against the ship and *in personam* against the charterer (which stood in the position of the owner). Cargo owners who were unable to prevail *in personam* against the vessel owner since they could show no personal negligence of the owner or its managing officers and agents, argued that since historically as owners of damaged cargo they had a maritime lien on the vessel and because the Fire Statute made no reference to an exculpation of the vessel, but merely stated that "no owner of any vessel shall be liable", it could continue its *in rem* action against the ship. This Court, rejecting this position and aptly labeling it a "riddle", said as follows:

> "Apart from this inapplicable exception the immunity granted appears on its face complete. But claimants contend that because their contracts of affreightment were signed 'for master' they became under maritime law ship's contracts, independently of any owner's contracts, and that the ship itself stands bound to the cargo though the owner may be freed. It seems unnecessary to examine the validity of the claim that apart from the statute claimants under the circumstances would have a lien on the vessel, or to review the historical development of the fiction that

[29] "No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

the ship for some purposes is treated as a jural personality apart from that of its owner. If we assume that the circumstances are appropriate otherwise for such a lien as claimants assert, it only brings us to the question whether The Fire Statute cuts across it as well as other doctrines of liability and extinguishes claims against the vessel as well as against the owner.

"The provision here in controversy is Section 1 of the Act of March 3, 1851. Despite its all but a century of existence, the contention here made has never been before this Court. Sections 3 and 4 of the same Act in other circumstances provided limitations of liability, and as to them a question was considered by this Court in the City of Norwich (Place vs. Norwich & N. Y. Transp. Co.), 118 U.S. 468 (1886), stated thus: *'It is next contended that the Act of Congress does not extend to the exoneration of the ship, but only exonerates the owners by a surrender of the ship, and freight, and, therefore, that the plea of limited liability cannot be received in a proceeding in rem'. The Court rejected the contention and held that when the owners satisfied the limited obligation fixed on him by statute, owner and vessel were both discharged. The Court said that 'To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles.' The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age. . . .*

"Claimants urge that the statute as construed goes beyond any other exemption from liability for negligence allowed to a common carrier, and that it should therefore be curtailed by strict construction. We think, however, that claimants' contention would result in a frustration of the purpose of the Act."[30]

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[30] (320 U.S. 249, 252-254) (Emphasis supplied).

To permit Respondent to maintain its separate *in rem* action in Texas will as much frustrate the obvious purpose and intent of the agreement in the bill of lading as would permitting prosecution of an *in rem* action by owners of fire-damaged cargo where the shipowner had been judicially declared not negligent and not liable under The Fire Statute. While it is true that contractual provisions prepared by one party should be strictly interpreted against them, it is also true that courts will interpret contracts in such a way that they have their intended effect and reflect the obvious intention of the parties though they be inartfully worded. The interpretation of the clause for which Respondent contends would result in a frustration of its clear intent, a result which this Court declined to approve in the *Consumer's Import* case.

An interpretation that the clause covers both claims against the owner and the ship is even more clearly required where as here, Respondent has the full security to which it is entitled in the form of a corporate surety bond which fully substitutes for the vessel and also has already obtained jurisdiction *in personam* over the shipowner in the agreed upon forum. The District Court was correct in so interpreting the agreement.

District Court Order Should Be Sustained Without Regard To The Agreement

While the District Court did not rely on it, its action in declining jurisdiction is sustainable under the doctrine of forum non conveniens, without regard to the agreement. While recognizing the general principle, the precise question

was left open by this Court in *Swift & Co. Packers v. Compania Columbia Del Caribe, S.A.*,[31] when speaking through Mr. Justice Frankfurter, the Court said:[32]

> "There remains the question whether the District Court's order may be justified as an exercsie of discretion to decline jurisdiction under the doctrine of forum non conveniens. The doctrine is of long standing in admiralty, but this Court has not previously had to apply it to a suit brought by a United States citizen. Such application has been rare even in the lower federal courts. Cf. Canada Malting Co. vs. Paterson Steamships, Ltd. 285 US 413, 76 L ed 837, 52 S Ct 413; United States Merchants' & Shippers' Ins. Co. v. A/S Den Norske Afrika OG Australie Line (CA2dNY) 65 F2d 392; see Braucher, The Inconvenient Federal Forum, 60 Harv L Rev 908, 920, 921 (1947); Bickel, Forum Non Conveniens in Admiralty, 35 Cornell L Quart 12, 41-47 (1949). We need not now decide the abstract question whether United States admiralty courts may decline jurisdiction over libels brought by United States citizens. Discretion could not sustain declination in this case. Application of forum non conveniens principles to a suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners. The District Court gave no indication that it recognized such considerations. Its opinion indicates that in so far as it may have exercised discretion to decline jurisdiction it was moved to do so by its view that such jurisdiction does not exist. But, in any event, it was improper under the circumstances here shown to remit a United States

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[31] 339 U.S. 684 (1950).

[32] 339 U.S. 684, at page 697.

citizen to the courts of a foreign country without assuring the citizen that respondents would appear in those courts and that security would be given equal to what had been obtained by attachment in the District Court. The power of the District Court to give a libellant such assurance is shown by Canada Malting Co. v. Paterson Steamships, Ltd. 285 US 413, 424, 76 L ed 837, 843, 52 S Ct 413. See also The City of Agra (DC NY) 35 F. Supp 351.

While as previously indicated the District Court did not rely on its inherent power to decline jurisdiction in an admiralty case such as this,[33] both security and appearance in the agreed upon forum have been assured to Respondent here. Since the agreed upon forum is in fact the only convenient forum for the litigation of the issues in this case, and Respondent has both its security and personal jurisdiction in Italy, the District Court's action in this case should be sustained under its inherent powers in admiralty cases without regard to the agreement.

Although it did so on different grounds, the District Court reached the correct result as the record amply reflects the convenience of the forum in Italy. Thus while this Court may not agree with the reason stated by the District Court in granting the Motion, it can and should reinstate the District Court's order on the alternative ground that it was within its inherent powers in admiralty cases under the doctrine of forum non conveniens, and this should be and can be done both as to the *in personam* and *in rem* actions.

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[33] This basis for declining jurisdiction was also urged by Petitioners in their motion before the District Court. (R. 10).

Conclusion

It is therefore respectfully submitted that the judgment of the Court of Appeals below should be reversed and that of the District Court below reinstated.

Respectfully submitted,

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February 27, 1959

SUPREME COURT, U. S.
MAR 2 1959
JAMES R. BROWNING, Clerk

No. 178

IN THE

Supreme Court of the United States

October Term, 1958

SS MONROSA, HER ENGINES, TACKLE, ETC., AND NAVIGAZIONE ALTA ITALIA, *Petitioners*

-versus-

CARBON BLACK EXPORT, INC., *Respondent*

ON WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit

REPLY FOR PETITIONERS TO BRIEF OF AMICUS CURIAE

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REPLY FOR PETITIONERS TO BRIEF OF AMICUS CURIAE

The contentions made and the fears expressed by the Amicus Curiae[1] are all founded and predicated on two

[1] Briefly summarized they are:
1. A shipper has no protection against such an agreement as this to litigate claims for cargo damage in Italy.
2. The agreed upon forum may not apply the United States Carriage of Goods by Sea Act.
3. The agreed upon forum may resolve any conflicts in favor of foreign law.
4. The agreed upon forum may apply a foreign limitation of liability statute and thus reduce cargo's possible recovery.

wholly unfounded assumptions on the part of the Amic Curiae. These are:

1. That American Courts will not perform the judicial function and require any such agreement as place of litigation to be reasonable under the facts a particular case, and

2. That notwithstanding the express incorporati of the United States Carriage of Goods by Sea A in the bill of lading, that the foreign courts w apply foreign law rather than the law specifical called for by the contract of carriage.

Thus, the Amicus Curiae joins Respondent in its affro to the integrity of the American Judiciary by in effe saying that American Courts will not perform their judici function in determining the reasonableness of any su agreement so as to fully and adequately protect not on the rights of an American shipper but the rights of foreign shipowner as well. We submit that all of the fea expressed by the Amicus Curiae quickly pale into insi nificance once the reasonableness of the agreement is le to the sound discretion of the American Judiciary. Pet tioners, and we submit all reputable foreign shipowner are perfectly willing to leave the reasonableness of ar such agreement to the American Courts.

The Amicus Curiae makes the same basic error th Respondent does, for it views this case as one that, und all circumstances and all fact situations, will automatical permit a foreign shipowner to obtain an order directin that a cargo claim be asserted in the forum agreed upo in the bill of lading. Admittedly, Petitioners do not see

any such blanket ruling, but only that where such an agreement is in fact reasonable under the facts and circumstances of a particular case such as is true here, that the agreement of the parties with respect to the forum be enforced.

The Amicus Curiae's apparently more substantial concern, however, as reflected by its Points II, III and IV, is that the agreed upon forum may not apply the United States Carriage of Goods by Sea Act, that the agreed upon forum will apply foreign law, and that in applying such foreign law the limitation statutes might reduce the amount of recovery by cargo claimants.

For these fears of the Amicus Curiae to be justified, this Court must assume not only that American Courts will not properly consider the reasonableness of the agreed upon forum, but that the agreed upon forum will completely ignore a clause normally found in most bills of lading such as Clause 32 of the bill of lading in this case which expressly provides that the bill of lading has effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, and that if any term in the bill of lading is repugnant to the United States Carriage of Goods by Sea Act to any extent, that term shall be void. (R. 25).[2]

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[2] Clause 32 reads in full as follows:

"This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further.

We do not believe that this Court will base its decision in this case on the assumption that the agreed upon forum in Italy will not enforce the provisions contained in the bill of lading as written. To decide this case on the basis of the fears of the Amicus Curiae would require this Court to hold that the agreed upon forum would completely disregard Clause 32 of the bill of lading and apply the Italian law in its entirety. We do not believe this Court will take judicial notice that such will occur or assume that the Italian Court will not adjudicate the matter on the basis of the contract between the parties.

With particular reference to Points III and IV of the brief of the Amicus Curiae where concern is expressed about possible recovery being limited by the foreign law, in this case, at least, any provision of the bill of lading that might invoke foreign law is expressly made void by Clause 32.

Here, again, these fears can also be controlled by our own judiciary in considering the reasonableness of the agreement with respect to the forum. If any such limiting results are likely to occur, the discretion vested in the American Courts is more than ample to protect the shippers.

Conclusion

For the reason stated, the brief of the Amicus Curiae in support of the Respondent in fact offers no assistance or reasonable basis on which the judgment of the Court

of Appeals should be affirmed. It is submitted that the order of the District Court should be reinstated.

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Petitioners,

versus

CARBON BLACK EXPORT, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 178.

SS. *Monrosa*, Her Engines, Tackle, etc.
and NAVIGAZIONE ALTA ITALIA,

Petitioners,

versus

CARBON BLACK EXPORT, INC.

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The petitioners seek to have this Court rule on the following two issues:

1. The validity and enforceability of a clause in a bill of lading issued by an Italian shipowner which provides that legal proceedings for cargo damage against the "Captain or ship owner or their agents" must be brought in Genoa; and

2. That the clause should be interpreted to include legal proceedings *in rem* although the clause refers to legal proceedings against the "Captain or shipowner or their agents" only.

Statement.

Carbon Black Export, Inc., a New York corporation, brought an action in the United States District Court for the Southern District of Texas, Houston Division against the *SS. Monrosa* and Navigazione Alta Italia, an Italian corporation to recover for damage to shipments of carbon black, totalling approximately 29,000 bags, which had been loaded on the said vessel at United States ports of Houston, Texas and New Orleans, Louisiana for discharge in Italy.

Some of the carbon black was stowed in No. 5 hold of the vessel together with drums of chemicals and other cargoes which also had been loaded in the United States. During the voyage seawater entered through wasted plates in No. 5 hold and caused serious damage to the carbon black.

At the time the carbon black was loaded on the *SS. Monrosa* bills of lading printed in English were issued by the carrier. These documents contained *inter alia* the clauses set forth on page three of the petition herein.

The damage complained of above occurred in January, 1956. Approximately three months thereafter the *SS. Monrosa* again called at ports in the United States and this action was commenced. (Since then the vessel has returned occasionally to the United States)

The libel (R. 4-11) was filed on April 3, 1956 and service was had on the same day on the petitioners herein by serving a citation on Texas Transport & Terminal Co., Inc., as agent for Navigazione Alta Italia. A general appearance was filed on behalf of the carrier on April 9, 1956. A warrant of seizure was not issued for the *Monrosa* since counsel representing the vessel agreed to file a release bond in the amount of $100,000 and also a claim of owner for the vessel. The bond and claim of owner were filed on April 9, 1956 (R. 12, 22-23).

At the time process was issued, Carbon Black Export Co., Inc. moved to take the depositions of the responsible officers of the vessel. This was vehemently opposed (R. 26). The delaying tactics of the carrier frustrated the attempts of the cargo owner to bring this matter on for prompt trial.

Several months after the commencement of this action petitioners herein made an application to the District Court to decline jurisdiction (R. 14-17) on the basis of the clauses in the bill of lading printed on page three of the petition. The District Court granted this motion and an appeal was taken. The Court of Appeals for the Fifth Circuit reversed the lower court and remanded the case to the District Court for further proceedings.

The Court of Appeals in the course of its decision reviewed both the facts and law and came to the conclusion that this action should be maintained in this country.

The choice of forum in this case should not be disturbed because:

1. This action is brought by a citizen of the United States, to wit: Carbon Black Export, Inc.

2. The cargo originated in the United States; thus all the testimony as to its condition is available in this country.

3. The cargo was loaded at ports in the United States, to wit: New Orleans, Louisiana and Houston, Texas.

4. All of the testimony as to the seaworthiness of the vessel on commencement of the above voyage is available in the United States through the carrier's agents.

5. All of the testimony as to the stowage of the cargo of carbon black is available here in the United States

through the stevedores who loaded the cargo at the ports of Houston, Texas and New Orleans, La.

6. All of the testimony with respect to the loading of other cargoes in the same compartment as the carbon black is available here in the United States through the stevedores who loaded those cargoes.

7. The bills of lading covering the carriage of the carbon black are printed in English.

8. The bills of lading incorporate the United States Carriage of Goods by Sea Act of 1936.

9. All of the log books of the *SS. Monrosa* as well as other documents pertaining to the voyage in question can be very easily produced in the courts of this country.

The Petition for Writ of Certiorari Should Be Denied.

1. The decision below is correct and in accord with controlling precedent. There is no conflict between the decisions of the Second and Fifth Circuits.

The petitioners herein request this Court to decide the questions presented because, they allege, the following three decisions decided by the United States Court of Appeals for the Second Circuit are in direct conflict with the decision of the United States Court of Appeals for the Fifth Circuit in the instant case:

> *Wm. H. Muller & Co.* v. *Swedish American Line Ltd., et al.*, 224 F. 2d 806 2 Cir., cert. denied 350 U. S. 903 (1955);[1]

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[1] The cargoes involved in this action were loaded at Gothenburg on the S.S. *Oklahoma*, a Swedish flag vessel owned by a Swedish corporation, to be discharged at Philadelphia. The *Oklahoma* never arrived in the United States as it was lost at sea.

The Geisha-Cerro De Pasco Copper Corp. v. *Knut Knutsen*, O. A. S., 2 Cir. 187 F. 2d 990 (1951);[2]

Murillo, Ltda, et al. v. *The Bio Bio, et al.*, 2 Cir. 227 F. 2d 519, (1955), aff'd 127 F. Supp. 13 (S. D. N. Y. 1955).[3]

The petitioners argue that the United States Court of Appeals for the Fifth Circuit denied their motion to have this matter referred to the Courts in Genoa on the sole ground that jurisdictional clauses are void as being against public policy. A reading of the decision of the lower court clearly points up the error of the petitioners. The Court of Appeals in its decision stated:[4] "We agree with libelant that the court below was in error in granting the motion to deny jurisdiction under the facts of this case * * *". Further, the Court emphatically distinguished the facts in this case from the facts in the *Muller* decision, *supra*, and clearly set forth the facts on which it relied in holding that this action should be maintained in this country:[5]

> "We do not find it necessary to espouse or reject the position taken by the Court of Appeals of the Second Circuit in the cases mentioned above, which are relied upon as marking a departure from this general rule. The facts before that Court in those cases were, in each instance, materially different from those before us. In addition to those already discussed, it is important to note that the contracts of carriage here were made in the United States and

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[2] The cargo involved in this action was loaded on the S.S. *Geisha*, a foreign flag vessel, in Peru to be discharged at European ports. The vessel did not touch any port in the United States.

[3] The cargoes were carried on three Swedish flag vessels owned by Swedish corporations. The cargoes were loaded at Antwerp, Belgium and were to be discharged at Arica, Chile. None of the vessels touched any port in the United States.

[4] 254 F. 2d 297, 300 (also at page 19 in the petition).

[5] 254 F. 2d 297, 301 (also at page 22 in the petition).

were partially performed here, that the bills of lading specifically adopted the Carriage of Goods by Sea Act of the United States as part of their provisions and were printed in English, tending to indicate that the parties recognized that the courts of the United States were in a good position to pass upon the rights of the parties to them. It is further noteworthy that the testimony of the crew of the *Monrosa* was sought by libelant and resisted by respondents when the crew were in Houston; and, finally respondents invoked the jurisdiction of the court below in general terms and rested upon this action several months before challenging that jurisdiction by its motion."

The same reasoning was followed by the Second Circuit. That Court did not decline to take jurisdiction of the cases cited above, mainly because the bills of lading provided that actions be litigated in foreign countries. Rather, it considered the facts in each case and then determined whether the interests of the parties, based on availability of witnesses and other factors, would be best served by a trial here or in a foreign tribunal.

The Court of Appeals for the Second Circuit in the *Muller* case, *supra*, recognized that parties can not oust a United States Court of jurisdiction by agreement and unambiguously held that each case must be judged on its own facts.[6]

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[6] 224 F. 2d 806, 808 "From this it follows that in each case the enforceability of such an agreement depends upon its reasonableness. We agree with the appellant to this extent: the parties by agreement cannot oust a court of jurisdiction otherwise obtaining; notwithstanding the agreement, the court has jurisdiction. But if in the proper exercise of its jurisdiction, by a preliminary ruling the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented. Such, essentially, was our holding in Cerro De Pasco Copper Corp. *v.* Knut Knutsen in the case of The Geisha, 2 Cir., 187 F. 2d 990. We adhere to that ruling."

The same principle was declared in the *Geisha* case.[7]

To like effect did Judge Murphy of the United States District Court for the Southern District of New York hold in the *Bio-Bio* case, *supra*.[8]

Basically the courts have and will enforce a jurisdictional clause in an agreement only where the doctrine of forum *non conveniens* can be invoked. Thus we must consider why the litigants in the three cases cited by the petitioners herein were relegated to foreign tribunals.

It is important to note that in all three cases the cargoes in question were loaded in foreign ports; in all three cases the covering bills of lading were issued in foreign lands; in none of the cases did the cargoes or vessels touch the United States; in none of the cases was any part of the contract of carriage performed in the United States. Thus all of the testimony and documents pertaining to the main issues in each case, i.e., stowage of cargo, seaworthiness of the vessel, condition of the cargo, issuance of bills of lading, and all other important matters could only be obtained outside the United States. In fact in both the *Geisha* and

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[7] 187 F. 2d 990, 991 "The court's conclusion that it was not the appropriate forum clearly did not constitute an abuse of discretion, considering these facts stated by the district judge: 'No loading of this vessel took place in any United States port. All of the cargo was to be delivered in European ports * * *. None of the crew of the Geisha are in the United States and none are planning to visit the United States' ".

[8] 127 F. Supp. 13, 16 "In the light of all of the connecting factors, the reasonableness of the limitation of tribunal to the carrier's domicile is apparent. There is no reason why this court ought not to give it consideration. Weighing thus this stipulation in the balance of conveniences, respondents have sustained the burden of making out the inconvenience of this forum."

Bio-Bio cases the libelants were not citizens of the United States.[9]

How different the facts are in the instant case where most, if not all, of the testimony as to stowage of cargoes, issuance of bills of lading, seaworthiness of the vessel, condition of the cargoes, is available right here in the United States. It can be readily recognized why the United States Court of Appeals for the Fifth Circuit, on the basis of the facts involved, held that this action must be tried in this country.

Notwithstanding the three decisions referred to, the courts in the Second Circuit are still reluctant to enforce jurisdictional clauses.[10]

Even though the United States Court of Appeals for the Fifth Circuit stated in the course of its decision that clauses which seek to oust the jurisdiction of the courts of this country are contrary to public policy and should not be enforced, it did no more than reiterate the holdings in the majority of jurisdictions in this country.[11]

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[9] Although one of the named libelants in the *Bio-Bio* case was a New York corporation, the court found that its connection with the transaction was very nominal. Judge Murphy said in this case 127 F. Supp. 13, 15: "Under circumstances of such nominal participation on the part of the only citizen of the United States involved, in addition to the consideration that testimony of such party as witness would add nothing in the face of shipping documents and evidence of weighing from distant locations, little if any support favoring retention of jurisdiction is supplied by joinder of the New York corporation as co-libelant."

[10] Chemical Carriers Inc. *v.* L. Smit & Co.'s Internationale Sleepdienst 154 F. Supp. 886, 888 "It is no longer the law that contractual provisions which purport to limit a jurisdiction which would otherwise attach are void and unenforceable. (Cases cited) Nevertheless, such agreements, particularly those calling for exclusive jurisdiction in a foreign court, are not looked upon with favor and will not be enforced by the Federal courts if they are unreasonable in themselves or in the effect they may have on the rights of the parties to the dispute. (Cases cited)"

[11] During the course of its decision the United States Court for the Fifth Circuit referred to two leading texts, *Corpus Juris Secun-*

The state courts of the State of New York, within which the United States District Court for the Southern District of New York and the United States Court of Appeals of the Second Circuit sit, agree with the majority rule.[12]

In fact the United States Court of Appeals for the Fifth Circuit in considering jurisdictional clauses as against public policy followed the decision of this court in *Insurance Company* v. *Morse,* 87 U. S. 445. In that case, the State of Wisconsin provided by statute that, as a condition precedent to doing business in that state, all foreign corporations must agree not to remove any action to the federal courts. The Insurance Company did agree to this but when sued allegedly violated the agreement by removing the case to the federal court. The Supreme Court of Wisconsin

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dum and *American Jurisprudence.* See 254 F. 2d 297, 301, (also at page 21 of the petition herein)

> "The rule is thus epitomized in the headnote of the article on Contracts, 17 C. J. S. §229, p. 603: 'Contract provisions intended to oust courts of their jurisdiction in advance, as distinguished from provisions merely imposing conditions on the exercise of the right to sue, are void. This rule has been frequently considered in determining the validity of contracts as to venue, periods of limitation, notice or demand, and evidence.'
>
> "And see also 14 *Am. Jur., Courts,* §196, pp. 389-390, which thus summarizes the rule: 'Both in England and the United States it has been decided in a great number of cases, and conceded in an equally large number of other cases, to be settled law, that the jurisdiction of the courts cannot be ousted by the private agreement of individuals made in advance, that the private persons are incompetent to make any such binding contracts, and that all such contracts are illegal and void as against public policy.'
>
> "Cited to both texts are a number of decisions of the Supreme Court of the United States; and cf. our decision in Burt *v.* Isthmus Development Co., 1955, 218 F. 2d 353, 356, cert. den. 349 U. S. 922."

[12] In re application of Hamburg-American Line, 135 Misc. 715, 238 N. Y. S. 331 (1930); aff'd 228 App. Div. 802; 239 N. Y. S. 914; *Parker* v. *Kraus Co. Ltd.,* 157 Misc. 667, 284 N. Y. S. 478; aff'd 249 App. Div. 718, 292 N. Y. S. 955.

upheld the agreement, but this court thereupon reversed with no qualification that the agreement would have been valid if reasonable. In its decision this court promulgated the principle that citizens of this country have an absolute right to litigate their grievances in our courts—a right which they can not barter away. Consequently, this court ruled that any agreement to do so must be considered illegal and void.[13]

Thus the Court of Appeals in this case consciously adhered to a ruling of this court enunciated eighty-four years ago.

2. The jurisdictional clause under discussion does not preclude a cargo owner from bringing a suit *in rem* in the courts of the United States.

The petitioners' claim that clause 27 in the bill of lading is sufficiently broad to include both suits *in personam* and *in rem*. However, by its own language this clause refers to

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[13] 87 U. S. 445, 451

> "Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot as was held in *Cancemi's Case*, be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.
>
> "That the agreement of the insurance company is invalid upon the principles mentioned, numerous cases may be cited to prove. They show that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void."

proceedings against "the captain or shipowners or their agents" only.

It is a universally recognized rule of law that if there is any ambiguity in a contract it must be resolved against the person preparing that contract.[14]

Thus the glaring omission of suits *in rem* can only have one interpretation, that is, the carrier intended to submit its vessels to the jurisdiction of our courts.

The petitioners herein stress that the United States Court of Appeals for the Second Circuit held in the *Bio-Bio* case that jurisdictional agreements included actions *in rem* as well as actions *in personam*. We must correct the petitioners' impression of that case. Although the S. S. *Bio-Bio* was named as respondent in the libel no process was ever issued against the vessel; no claim of owner was filed in the proceeding on its behalf; no bond was posted on its behalf and no letter of guarantee was issued by anyone on its behalf. In other words, there was no *in rem* proceeding in that case at all. The court records have been searched and there is nothing to substantiate the petitioners' contention.

It has long been recognized that a party who has a mari-

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[14] 17 Corpus Juris Secundum 751-753:

"§324. Construction against Party Using Words • • •

Where a contract is ambiguous it will be construed most strongly against the party preparing it or employing the words concerning which doubt arises, the reason for the rule being that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage; • • •

and continuing at page 754:

"• • • *Printed forms.* The rules just stated are of course peculiarly applicable where the contract is on a printed form prepared by one of the parties."

time lien against a vessel has the right to proceed *in rem* in any jurisdiction where the vessel can be found.[15]

Certainly the petitioners cannot be serious in their argument that the jurisdictional clause in the bill of lading nullifies the right of an injured party to proceed against a vessel.

3. The decisions in *Smith* v. *The Mormacdale,* 3 Cir. 198 F. 2d 849 (1952); *Bennett* v. *S. S. Mormacteal,* et al., 2 Cir. 254 F. 2d 138 (1958) affirming 160 F. Supp. 840; *Samuels* v. *Munson Steamship Line,* 63 F. 2d 861 (1933), referred to on pages 11 and 12 of the petition herein have no applicability to the issues involved in this case.

In those cases a longshoreman brought an action *in rem* to recover for personal injuries. The longshoreman's rights are governed by the Longshoremen and Harbor Workers' Compensation Act, 33 U. S. C. A. §901, *et seq.* In all of those cases the libelant's employer was also the vessel owner. The courts which decided the cases were interpreting the Longshoremen and Harbor Workers' Compensation Act. They in fact held that under this Act a longshoreman could not bring an action against a vessel which was owned by his employer but that his remedy was exclusively that provided for under the aforementioned Act.

Here the question is only an interpretation of a contract pertaining to procedure and not the construction of a Federal statute.

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[15] Motor Distributors Ltd. *et al. v.* Olaf Pedersen's Rederi A/S 239 F. 2d 463, 467

> "Moreover, something deeply significant in the whole field of maritime law is here at stake. With respect to ocean-going carriers it seems that one of the most universally recognized rules of law is that which gives the right to libellant, possessing a maritime lien against a vessel, to proceed *in rem* in the jurisdiction where the vessel is found."

It is respectfully submitted that the foregoing considerations require denial of the Petition for Writ of Certiorari in this case.

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No. 178

IN THE

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OCTOBER TERM, 1958

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NAVIGAZIONE ALTA ITALIA,
Petitioners,

versus

CARBON BLACK EXPORT, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

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No. 178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

SS. *Monrosa*, her engines, tackle, etc., and
NAVIGAZIONE ALTA ITALIA,

Petitioners,

versus

CARBON BLACK EXPORT, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

Questions Presented.

I. Is a clause inserted by an Italian shipowner in an ocean bill of lading issued at a United States port and which provides for legal proceedings in the courts of Genoa exclusively, valid and enforceable against a United States citizen?

II. Does the claimed prohibition of legal proceedings against "the Captain or Shipowners or their Agents," as set forth in Clause 27 of the bill of lading prepared by an Italian shipowner, include an action *in rem* against the offending vessel?

Statement of the Case.

This case involves the right of an American citizen to sue an Italian vessel and her Italian shipowner in United States courts for damage sustained by cargo loaded in the United States and destined for foreign ports.

The respondent herein, Carbon Black Export, Inc., is a domestic corporation organized under the laws of Delaware with its principal place of business in New York City (R. 2, 29). One of its main activities is the manufacture and production of carbon black.

Navigazione Alta Italia is an Italian corporation and has its main office in Genoa, Italy (R. 3, 29). It is a common carrier of merchandise by water for hire and owns and operates a fleet of vessels, all flying the Italian flag, one of which is called the SS. *Monrosa* (R. 3, 29). These vessels maintain scheduled runs between the Gulf ports of the United States and Italian and other Mediterranean ports (R. 29). To handle its business in Houston, Texas, this carrier designated as its general agent Texas Transport & Terminal Co., Inc. (R. 17, 29), which maintains an office in the Cotton Exchange Building, Houston, Texas.

In December, 1955, Carbon Black Export, Inc. prepared 29,299 bags of carbon black for overseas shipment (R. 3, 4). Navigazione Alta Italia was engaged as the carrier and it designated the SS. *Monrosa* as the carrying vessel (R. 3).

The cargo was delivered to the carrier at Houston, Texas (12,060 bags) and at New Orleans, Louisiana (17,239 bags) (R. 3, 4, 29).

On final loading of the carbon black on the SS. *Monrosa,* the shipowner executed 27 of its printed bills of lading and delivered them to the shipper. All of these documents are similar and one has been made part of the record (R. 11-28).

The cargo was in good order and condition on loading (R. 3, 4) and was to be safely carried and discharged in the same condition at Genoa, Venice and Trieste, Italy (R. 4, 5). However, during the voyage sea water entered the No. 5 hold of the vessel, came into contact with part of the carbon black causing extensive damage (R. 31). It is the contention of the respondent that the loss resulted from the unseaworthy condition of the vessel at the commencement of the voyage, i.e., when it left Houston, Texas, and New Orleans, Louisiana. This will be one of the main issues on the trial of the case (R. 31).

When the vessel returned to the United States on its scheduled run in April, 1956, (R. 30) this admiralty action was commenced in the United States District Court for the Southern District of Texas, Houston Division, against both the vessel and the shipowner (R. 2-7).

In order to avoid seizure of the vessel and its detention, the shipowner agreed to post a $100,000 bond in the District Court (R. 7, 30) and filed a Claim of Owner (R. 45), simultaneously with a general appearance on behalf of the shipowner (R. 44).

Upon filing the libel, the respondent herein sought to take the depositions of the officers and crew members of the SS. *Monrosa*. This procedure was strenuously opposed by the petitioners and their objections were sustained by the District Court (R. 32). Thus the carrier succeeded in delaying a prompt trial of the issues in this country—undoubtedly with the hope that it would be in a more advantageous position in its home forum.

It is doubtful that the Italian carrier has acted in good faith in this litigation. It now strongly urges that this action should be tried in Genoa, Italy, mainly because the officers of the *Monrosa* are residents of that country. However, their depositions could have been taken not only when

this action was commenced but also on a number of occasions when the SS. *Monrosa* returned to our ports subsequent to April, 1956 (R. 32).

In July, 1956 the petitioners requested the District Court to decline jurisdiction, (R. 8-28) relying on Clause 27 in their prepared, printed, unilateral bill of lading:

> "Clause 27—Also, that no legal proceedings may be brought against the Captain or Shipowners or their Agents in respect to any loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, notwithstanding that the ship may be legally represented there."

The motion was opposed on these grounds (R. 28-34):

1. Carbon Black Export, Inc. is an American citizen and accordingly should be entitled to sue in the courts of the United States and should not be forced to pursue litigation in the courts of Italy;

2. Clause 27 of the bill of lading did not prohibit an action *in rem* in the federal courts of the United States;

3. The carbon black was shipped from the ports of Houston and New Orleans and thus in those cities testimony is available as to the good order and condition of the cargo, the manner in which it was stowed on the SS. *Monrosa* and the seaworthiness of the vessel at the commencement of the voyage;

4. The *Monrosa* had made frequent calls at Gulf ports in the United States and thus the testimony of the crew members and officers could be taken here in the United States;

5. The shipowner still maintains an office through its general agent in Houston and in other Gulf ports

and its vessels make scheduled runs between Gulf ports of the United States and ports in Italy and other Mediterranean ports.

The District Court held for the petitioners and stated that Clause 27 was not unreasonable, citing *William H. Muller & Co.* v. *Swedish American Line, Ltd. et al.*, 224 F. 2d 806, cert. denied 350 U. S. 903, 76 S. Ct. 182 (R. 36-37).

An appeal was taken to the United States Court of Appeals for the Fifth Circuit, which reversed the District Court (R. 46-53). That court after careful deliberation on all the questions involved, held:

1. That agreements similar to that contained in Clause 27, made in advance of controversy whose object is to oust the jurisdiction of the courts, are contrary to public policy and will not be enforced; (R. 50)

2. That Clause 27 did not encompass suits *in rem* and thus had no applicability in this case as the action had been commenced not only against the shipowner but also the carrying vessel, the SS. *Monrosa* (R.49-50);

3. That the forum chosen by Carbon Black Export, Inc. was proper since (R. 51-52):

a. This action was brought by a citizen of the United States (to wit: Carbon Black Export, Inc.);

b. The cargo originated in the United States; thus all the testimony as to its condition is available in this country;

c. The contract of carriage was in part performed in the United States;

d. The bills of lading covering the carriage of the carbon black are printed in English;

e. The bills of lading incorporate the United States Carriage of Goods by Sea Act of 1936;

f. The testimony of the crew of the SS *Monrosa* could have been taken when the vessel was in the United States.

The decision of the Court of Appeals was correct in all respects.

Summary of Argument.

I. Agreements made in advance of controversy, the purpose of which is to oust United States courts of jurisdiction, have long been recognized as invalid as against the public policy of the United States.

The respondent, Carbon Black Export, Inc., an American citizen, engaged the petitioners, Navigazione Alta Italia and one of its vessels, the SS. *Monrosa,* to carry a quantity of carbon black. The cargo was loaded at Houston and New Orleans and at that time the petitioners executed twenty-seven of their prepared and printed bills of lading.

During the voyage the cargo was damaged and this action was commenced in the District Court, which it is conceded had jurisdiction.[1]

Clause 27 in the bill of lading provides in substance that no legal action thereunder may be brought against the captain, shipowners, or their agents in any court except those located in Genoa, Italy. This provision indisputably was incorporated by the carrier for its benefit and was intended to deprive American citizens and others from litigating their meritorious claims in courts in the United States.

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[1] Article III, Section 2 of the United States Constitution, 28 U. S. C. Sec. 1333.

As early as 1874, the Supreme Court of the United States ruled in *Insurance Company* v. *Morse*, 87 U. S. 445, that agreements and statutes which ousted United States courts of jurisdiction were invalid. This case has been consistently followed.

Twenty state jurisdictions which have considered similar agreements have reached the same conclusion as in *Insurance Company* v. *Morse*.

The majority of federal courts and especially those sitting in admiralty, have adhered to this principle, particularly where a common carrier unilaterally has inserted a provision in the bill of lading for its own advantage.

The petitioners argue that agreements providing for litigation of claims in foreign jurisdictions are valid when reasonable and cite as authority three cases decided in the Second Circuit, commonly referred to as the *Muller*[2], *The Geisha*[3] and *The Bio Bio*[4].

It is admitted that in each of those cases a jurisdictional clause was involved. However, the court did not rule on the validity of the jurisdictional clause itself but considered it together with all the facts and circumstances in each case. In other words, the court actually decided whether or not the forum chosen by the libelants was *more convenient* for the trial of the action.

As will be shown later, those cases can easily be distinguished from the case now before this court.

The fact that the Carriage of Goods by Sea Act[5] does not specify any forum for the trial of actions cannot be

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[2] *William H. Muller & Co.* v. *Swedish American Line, Ltd., et al.*, 224 F. 2d 806 (2 C. A.), cert. den. 350 U. S. 903 (1955).

[3] *The Geisha-Cerro De Pasco Copper Corp.* v. *Knut Knutsen, O. A. S.*, 187 F. 2d 990 (2 C. A., 1951).

[4] *Murillo, Ltd. et al.* v. *The Bio Bio, et al.*, 227 F. 2d 519 (2 C. A., 1955), aff. 127 F. Supp. 13 (S. D. N. Y., 1955).

[5] 46 U. S. C. Section 1300 and following.

interpreted that Congress intended to uphold the validity of jurisdictional clauses. Such clauses were not discussed when this act was drafted and passed. It is more logical to assume that there was no need for any consideration thereof since, prior to 1936, the overwhelming weight of authority in the United States was that they were invalid.

Petitioners would have Clause 27 enforced so as to encourage American shippers to engage American carriers to transport their goods to the exclusion of foreign flag vessels. This argument is without merit and a ruling to this effect would undoubtedly cause international ill will. Frequently American ships are not available to American shippers at the time they must deliver merchandise under their contracts, or American flag vessels are not scheduled to touch upon certain foreign ports and it is therefore necessary to engage foreign carriers.

If foreign carriers solicit American trade, they should be bound by American law.

II. An American citizen has the substantial right to select the forum in which he desires his action to be tried.

The petitioners, in asking this court to enforce Clause 27 are in effect depriving an American citizen of his right to litigate a cause of action in a United States court. They are further endeavoring for their own benefit to impose on an American citizen a condition, without consideration.

If foreign shipowners were given the absolute privilege to select any forum in which actions arising out of breach of contract of carriage were to be tried, it would result in a serious prejudice to American shippers and consignees. Claims involving a few hundred or a few thousand dollars would have to be abandoned for it would be economically unfeasible to sue in foreign countries.

Clauses such as No. 27 are for the carrier's benefit only, are prejudicial to American shippers and consignees. They in effect lessen the carrier's liability in violation of the provisions of the Carriage of Goods by Sea Act[6] and should be considered void.

III. Notwithstanding that Clause 27 in the bill of lading is invalid, *per se*, it is also unreasonable under the facts and circumstances in this case.

The petitioners rely on the *Muller*, *The Geisha* and *The Bio Bio* cases, *supra*, to support their position that Clause 27 is reasonable.

The courts in the Second Circuit considered the facts in each of those cases together with the jurisdictional clause and decided that for the convenience of the parties the cases should be tried in foreign countries. In all of those three cases the cargoes involved were loaded in foreign countries. The carrying vessels never touched the United States and no part of the contract of carriage was performed in the United States. Thus all of the testimony on the important issues in each case was available in foreign countries only.

In the instant case the facts are much different. Here the cargo was loaded at United States ports, the bills of lading were issued here and part of the contract of carriage was performed here. Only in the United States is there testimony as to the condition of the cargo, the seaworthiness of the vessel at the commencement of the voyage, the stowage of the cargoes, and the issuance of the bills of lading.

The petitioners plead that to prove seaworthiness of the vessel, it will be necessary to obtain the testimony of the officers and crew of the SS. *Monrosa*. The record is clear and uncontradicted that the depositions of these men could have been taken not only at the time this action was com-

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[6] 46 U. S. C. 1303(8).

menced but also when the SS. *Monrosa* returned to the United States on voyages subsequent to April, 1956.

Another point to consider is that the Italian courts would not enforce an agreement between an American citizen and an Italian resident which stipulated that all disputes thereunder must be litigated in the United States courts.

IV. Clause 27 does not apply to *in rem* actions.

Clause 27 must be strictly construed against the petitioners since they alone prepared and printed the bill of lading.

This clause states that no legal proceedings against the "Captain or Shipowners or their Agents" shall be brought in any court other than those located in Genoa, Italy. There is no mention of an *in rem* proceeding, a right which is recognized and enforced by our courts. The *in rem* proceeding is not just a device to obtain security but a ship in admiralty is liable, the same as any other legal person, and there are reciprocal obligations between ship and cargo. *The Maggie Hammond*, 76 U. S. 435.

The petitioners further contend that an *in rem* action cannot be divorced from an *in personam* action, citing three cases.[1] These cases have no application to this motion. They merely decided what rights a longshoreman had against his employer under the Longshoremen's and Harbor Workers' Compensation Act.

The petitioner's argument that Clause 27 includes an *in rem* action is a request to have the bill of lading rewritten for their own benefit. This the courts will not do.

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[1] *Smith* v. *The Mormacdale*, 198 F. 2d 849 (3 C. A., 1952); *Bennett* v. SS. *Mormacteal, et al.*, 254 F. 2d 138 (2 C. A., 1958) and *Samuels* v. *Munson Steamship Line*, 63 F. 2d 861 (5 C. A., 1933).

ARGUMENT.

Agreements such as those set forth in Clause 27 of the bill of lading, made in advance of controversy and which seek to oust United States courts of jurisdiction, are void and repugnant to public policy.

If Clause 27 of the bills of lading is enforceable, its effect is to oust the duly constituted admiralty courts of the United States of jurisdiction.

Article III, Section 2 of the United States Constitution grants the Federal Courts jurisdiction over all cases of admiralty and maritime jurisdiction.

> "SECTION 2. Jurisdiction of Courts.
>
> SECTION 2. The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * * to all Cases of admiralty and maritime Jurisdiction; * * * "

Admiralty and maritime jurisdiction is granted to the District Court; 28 U. S. C. Sec. 1333:

> "SEC. 1333. Admiralty, maritime and prize cases.
>
> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. * * *"

It is without question that the District Court did have jurisdiction of the case at bar, which jurisdiction is founded upon Constitutional grant. The issue before this Court then is clear:

"Does an Italian shipowner have the right or power to oust a proper District Court of its constitutional jurisdiction by inserting a clause, such as Clause 27, in its unilateral bill of lading prepared before any controversy has arisen?"

The weight of authority in the United States has unequivocally answered this question in the negative.

In the leading case of *Insurance Company* v. *Morse,* 87 U. S. 445, the State of Wisconsin provided by statute, that as a condition precedent to doing business in that State, a foreign corporation must agree not to remove any action to the federal courts. The insurance company did agree to this, but later violated the agreement by removing a cause to the federal court. The Supreme Court of Wisconsin upheld the agreement, but the United States Supreme Court reversed, saying at pages 450-452:

> "Is the agreement thus made by the Insurance Company one that, without reference to the statute, would bind the party making it?
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> "Should a citizen of the State of New York enter into an agreement with the State of Wisconsin, that in no event would he resort to the courts of that State or to the Federal tribunals within it to protect his rights of property, it could not be successfully contended, that such an agreement would be valid.
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> "We see no difference in principle between the cases supposed and the case before us. Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot, as was held in *Cancemi's* Case, be tried in any other manner than by a jury of twelve men, although he consent in open court

to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects, any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.

"That the agreement of the Insurance Company, is invalid upon the principles mentioned, numerous cases may be cited to prove. They show that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.

"In *Scott* v. *Avery*, one of the cases, the Lord Chancellor says: 'There is no doubt of the general principle that parties cannot by contract oust the ordinary courts of their jurisdiction. That has been decided in many cases. Perhaps the first case I need refer to was a case decided about a century ago. * * *,* * *

"And the principle, Mr. Justice Story, in his commentaries on Equity Jurisprudence, sec. 670, says is applicable in courts of equity as well as in courts of law. * * * The regular administration of justice might be greatly impeded or interfered with by such stipulation, if they were specifically enforced."

In *The Kensington*, 183 U. S. 263, this Court held that restrictions on the liability of a steamship company for its own negligence or failure of duty toward a passenger, being against public policy, would not be upheld, though the ticket was issued and accepted in a foreign country and contained a condition making it subject to the law thereof, which sustains such stipulations. The court said at page 269:

"* * * As, however, the ticket was finally countersigned in Belgium, and one of the conditions printed on its face provides that 'all questions arising hereunder are to be settled according to the Belgium law, with reference to which this contract is made,' it is insisted that such law should be applied, as proof was offered showing that the law of Belgium authorized the conditions. The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught. Story, Confl. L. Sections 38, 244.* * *"

The foregoing cases were followed in *Terral, as Secretary of State of the State of Arkansas,* v. *Burke Construction Co.,* 257 U. S. 529, 532:

"The principle established by the more recent decisions of this court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation

does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law.* * *"

Our research has uncovered twenty state jurisdictions which have decided similar cases. All have followed the *Morse, Kensington* and *Terral* decisions, *supra:*

ARIZONA:

Otero v. *Banco De Sonora,* 26 Ariz. 356, 225 P. 1112;

ARKANSAS:

Standard Pipe Line Co. v. *Burnett,* 188 Ark. 491, 66 S. W. 2d 637, cert. den. 292 U. S. 649, 78 L. Ed. 1499, 54 S. Ct. 857;

CALIFORNIA:

General Acceptance Corporation of California v. *Robinson,* 207 Cal. 285, 277 P. 1039;

CONNECTICUT:

Parker, Peebles & Knox v. *El Saieh,* 107 Conn. 545, 141 A. 884;

IDAHO:

McCarty v. *Herrick,* 41 Idaho 529, 240 P. 192;

ILLINOIS:

Johnson v. *Royal Motor Car Insurance Association*, 226 Ill. App. 147;

IOWA:

Field v. *Eastern Building and Loan Association*, Iowa Supreme Court, 117 Iowa 185, 90 N. W. 717;

MAINE:

Bartlett v. *Union Mutual Fire Insurance Company*, 46 Me. 500;

MASSACHUSETTS:

Nashua River Paper Company v. *Hammermill Paper Company*, 223 Mass. 8, 111 N. E. 678;

MINNESOTA:

Detwiler v. *Lowden*, 198 Minn. 185, 269 N. W. 367, 269 N. W. 838;

MISSOURI:

Brucker v. *Georgia Casualty Company*, 326 Mo. 856, 32 S. W. 2d 1088;

NEW YORK:

Parker v. *Krauss Co.*, 157 Misc. 667, 284 N. Y. S. 478;

NORTH CAROLINA:

Gaither v. *Charlotte Motor Car Company*, 182 N. C. 498, 109 S. E. 362;

OREGON:

Kahn v. *Tagwell*, 125 Or. 528, 266 P. 238;

PENNSYLVANIA:

Healy v. *Eastern Building and Loan Association*, 17 Pa. Super. 385;

RHODE ISLAND:

Pepin v. *Societe St. Jean Baptiste*, 23 R. I. 81, 49 A. 387, 91 Am. St. Rep. 620;

TENNESSEE:

Dafoe v. *Starek*, 9 Tenn. App. 668;

TEXAS:

Bexar County Mutual Insurance Company v. *Ward et cix*, Tex. Cir. App. 245 S. W. 2d 325;

WASHINGTON:

Washington Local Lodge No. 104 et al. v. *International Brotherhood, etc.*, 183 P. 2d 504, 28 Wash. 2d 536;

WEST VIRGINIA:

Savage v. *Peoples' Building Loan & Savings Association*, 45 W. Va. 275, 31 S. E. 991.

The lower federal courts, both on the civil side and sitting in admiralty, have generally adhered to the above principle of law:

United States v. *Leahy*, (3 Cir.), 148 F. 2d 462, 467;

United Fuel Gas Co. v. *Columbian Fuel Corporation*, (4 Cir.), 165 F. 2d 746;

Burt v. *Isthmus*, (5 Cir.), 218 F. 2d 353, cert. denied 349 U. S. 922;

Columbia Casualty Company v. *T. E. Mahaney*, (5 Cir.), 229 F. 2d 848;

Akerly v. *New York Central R. Co.*, (6 Cir), 168 F. 2d 812.

The Ciano, 58 F. Supp. 65, 66;[8]
The Neck, 138 Fed. 144;[9]
The Falls of Keltie, 114 Fed. 357, 358;[10]
Jefferson Ins. Co. v. *Cia Colonial de Navegacao*, 121 F. Supp. 828;
Gough et al. v. *Hamburg Amerikanische Packetfahrt Aktiengesellschaft*, 158 Fed. 174;

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[8] In that case six libelants sued in admiralty and the Steamship "Ciano" was attached under a writ of attachment. The proctors for the vessel and her owners filed exceptions to the libel on the ground that Clause 18 in the bill of lading provided that shippers and receivers submitted themselves to the jurisdiction of the judges and tribunals where the shipowners were located. The court dismissed the exceptions in this language found at pages 66-67:

> "In analyzing carefully the authorities, I am persuaded to the views set forth in *The Edam* case, *supra*, as it seems to me that these provisions are not in a true sense, clauses providing for arbitration, but rather clauses and agreements which attempt to give preference to one court over another, and to attempt to construe them as real agreements for arbitration within the purview of the Arbitration Act would be to confer exclusively jurisdiction as here on a foreign tribunal and thus oust the jurisdiction of the United States Court.
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> "The exceptions are dismissed."

[9] "* * * Exclusive jurisdiction of all admiralty and maritime causes cognizable within the United States is by the Constitution vested in the National courts, and a citizen of the United States who is a party to a suit of admiralty and maritime jurisdiction cannot be deprived of the right to have such a suit adjudicated by a court upon which admiralty jurisdiction has been conferred pursuant to the Constitution. The Falls of Keltie (D. C.), 114 Fed. 357; 25 Am. & Eng. Encyc. Law (2d ed.), page 118."

[10] "* * * I do not think that the courts of any nation will refuse to hear the complaints and enforce the rights of its own citizens or subjects against foreign ships. Certainly this court has no right to refuse its process when demanded by any citizen of the United States. By the constitution of the United States, the people have ordained that judicial power shall be vested in the supreme court, and in inferior courts to be established by law, and that the judicial power shall extend to all cases of admiralty and maritime jurisdiction. The manifest purpose of these provisions is to insure to citizens of the United States means for the redress of wrongs and the enforcement of legal rights."

Latimer v. *S/A Industrias Reunidas F. Matarazzo*, 91 F. Supp. 469, 472;
The Edam, 27 F. Supp. 8;
The Joh Gorthon, 1949 A. M. C. 1198 (not officially reported).

The leading text authorities are in agreement with the decisions in the above cited cases.[11]

The petitioners contend that Clause 27 is valid and cite as authority: *William H. Muller & Co.* v. *Swedish American Line, Ltd., et al.*[12], *The Geisha-Cerro De Pasco Copper Corp.* v. *Knut Knutsen, O.A.S.*[13], and *Murillo, Ltd., et al.* v. *The Bio Bio et al.*[14] It will be demonstrated *infra* that in those cases the contracts were made and performed *outside the limits* of the United States and the shipments had no contact with any port of the United States. In the present case an American citizen is a party to the contract, the shipments originated in the United States and the contract was performed in the United States.

It is evident from a reading of these cases that the courts in the Second Circuit considered the jurisdictional clauses together with the convenience of the forum where the actions were brought and decided that it would be more convenient to try the actions abroad.

The petitioners advance two other points which we believe have little or no merit. However, since they have been made, they should be answered.

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[11] 17 Corpus Juris Secundum §229, page 603.
Williston on Contracts, Revised Edition, Volume VI §1725.
14 Am. Jurisprudence Courts, §196, pp. 389-390.
In *Knauth* "Ocean Bills of Lading—1953", page 238.

[12] 224 F. 2d 806 (2 C. A.), cert. denied 350 U. S. 903 (1955).

[13] 187 F. 2d 990 (2 C. A., 1951).

[14] 227 F. 2d 519 (2 C. A., 1955), aff'd. 127 F. Supp. 13 (S. D. N. Y. 1955).

The petitioners argue that since Congress did not define in the Carriage of Goods by Sea Act (46 U. S. C. 1300 *et seq.*) the forum or forums in which parties could bring an action, clauses providing for litigation abroad are valid. In the Congressional hearings held when the enactment of this Act was considered, jurisdictional clauses were not discussed. However, there was a specific provision inserted in the Carriage of Goods by Sea Act, prohibiting the carrier from exempting itself or limiting its liability.[15]

We fail to see the legitimacy of the petitioners' contention that Congress intended that a jurisdictional clause would be held valid when there was absolutely no discussion on the point.

Is it not more logical to assume that there was no necessity for including any provision in the act specifying the forums which are available to litigants when the overwhelming weight of authority was, prior to 1936, that jurisdictional clauses were *per se* invalid?

The other argument made by the petitioners is that an American shipper, having selected a foreign carrier to transport his goods, should be bound by a clause inserted in the bill of lading for the foreign carrier's benefit only. This argument has absolutely no substance. If the American shipper were compelled to ship his goods on American ships, it would have a serious effect on international trade and would result in ill-feeling among nations. Certainly foreign nations would not be very appreciative if American carriers inserted in their bills of lading that all litigation could only be resorted to in the courts of our country.

If foreign carriers solicit American trade, they should be bound by the rulings of our courts and our public policy where an American citizen is involved and brings a just cause of action.

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[15] 46 U. S. C. 1303(8).

Thus, based on overwhelming precedent, the United States Court of Appeals for the Fifth Circuit made a proper determination in the present case in holding[16] (R. 50):

> "We are of the opinion also that the court below should have denied the motion of respondent Navigazione to decline personal jurisdiction as to it. In essence, the motion was based upon Clause 27 as buttressed by the doctrine of *forum non conveniens*. Any consideration of such a question starts with the universally accepted rule that agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced."

Clause 27 of the bill of lading denies an American citizen his substantial right to select the forum where his action is to be tried and lessens the Carrier's liability in violation of the Carriage of Goods by Sea Act.

The respondent herein has a substantial right to select the forum in which to litigate its meritorious claim.

This right was upheld by this court in *Boyd* v. *Grand Trunk Western Railroad Company*, 338 U. S. 263, 265:

> "• • • We hold that petitioner's right to bring the suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of §5 of the Liability Act: 'Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void. . . .' The contract before us is therefore void."

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[16] 254 F. 2d 297, 300 (R. 46-52).

In that case the petitioner was an employee of a railroad. While acting in the scope of his employment he was injured. Thereafter the railroad made certain payments to him for necessities in return for a signed receipt which contained a clause providing that in the event his case could not be settled, he would sue in the place where he resided or where the injuries occurred, which was either in the Circuit Court of Calhoun County, Michigan, or the United States District Court for the Eastern District of Michigan. The petitioner sued in the Superior Court of Cook County, Illinois. The railroad company thereupon moved to dismiss, relying on the aforementioned agreement. This court ruled that the agreement was invalid as it was an attempt by the carrier to exempt itself of liability.

Although the Federal Employers' Liability Act was considered in that case, we believe the court recognized that an American citizen may, subject to jurisdictional requirements, sue in the forum of his choice.

Clause 32 of the bill of lading (R. 25) in the instant case incorporates the Carriage of Goods by Sea Act, 46 U. S. C. Section 1300 *et seq.* Section 1303(8)[17] thereof provides that any clause whereby the carrier seeks to lessen its liability is null and void.

Following the reasoning in the *Boyd* case, and by reading Clause 27 together with Section 1303(8) of the Carriage of Goods by Sea Act, we reach the inevitable conclusion that the petitioners are attempting to lessen their liability and thus the jurisdictional clause is void.

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[17] "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, *or lessening such liability otherwise than as provided in this chapter*, shall be null and void, and of no effect * * *" (Emphasis supplied).

The ruling of the *Boyd* case was adhered to in *Wilko* v. *Swan*, 346 U. S. 427, 437-438, 74 S. Ct. 182:

> "This accords with Boyd *v.* Grand Trunk Western R. Co., 338 U. S. 263, 70 S. Ct. 26, 94 L. Ed. 55. We there held invalid a stipulation restricting an employee's choice of venue in an action under the Federal Employers' Liability Act, 45 U. S. C. A. §51 *et seq.* Section 6 of that Act permitted suit in any one of several localities and §5 forbade a common carrier's exempting itself from any liability under the Act. Section 5 had been adopted to avoid contracts waiving employers' liability. It is to be noted that in words it forbade exemption only from 'liability.' We said the right to select the 'forum' even after the creation of a liability is a 'substantial right' and that the agreement, restricting that choice, would thwart the express purpose of the statute. We need not and do not go so far in this present case. By the terms of the agreement to arbitrate, the petitioner is restricted in his choice of forum prior to the existence of a controversy. While the Securities Act does not require petitioner to sue, a waiver in advance of controversy stands upon a different footing."

The aforementioned cases are followed by lower courts sitting in admiralty.[18]

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[18] *Kinsman Transit Co.* v. *Dunham Towing & Wrecking Co.*, 122 F. Supp. 911, 912":

> "• • • The libelant's choice of forum is a substantial right and should not be disturbed unless the balance of convenience lies strongly in favor of the respondent. Boyd *v.* Grand Trunk Western R. Co., 1949, 338 U. S. 263, 70 S. Ct. 26, 94 L. Ed. 55; Nicol *v.* Koscinski, U. S. Dist. Judge, 6 Cir., 1951, 188 F. 2d 537. The facts inherent in this case clearly demonstrate that the balance of convenience does not lie strongly in the respondent's favor. It may not be said, that 'for the convenience of the parties and the witnesses and in the interest of justice', the case should be transferred."

In *Wilko* v. *Swan, supra,* this court not only ruled that a litigant had a substantial right to select the forum in which to try his case but it also recognized that agreements made in advance of controversy stand on a different footing than those made after a controversy has arisen and in all probability the former are invalid.

If such jurisdictional clauses as set forth in Clause 27 of the bills of lading are upheld, what would be the effect? It could only mean that any shipowner, American or foreign, could provide that any dispute under the bill of lading be brought only in the state where the American shipowner is incorporated or in the city where the foreign shipowner is incorporated. Such possibilities seem remote but they are not absurdities. Following one step after the other, the ultimate could be attained and our American shippers or consignees would be so limited and restricted, or forego all right of redress for loss or damage to cargo.

By this attempted substitution of the place of trial in Italy for a citizen's constitutional right to the use of our courts, a lessening of the carrier's liability is accomplished. It is a restriction upon cargo which lessens a carrier's liability to respond in full for wrongful damage. Assume a just and meritorious claim involves only such sum as $1,000. Is it economically feasible to litigate the matter in Italy and transport to such country surveyors, persons having knowledge of market value, and fact witnesses or to take the depositions of such witnesses for use in the Italian courts? If not, then abandonment of the claim results and the carrier has in fact accomplished a lessening or avoidance of a liability otherwise imposed upon him by law and it has done this merely by resorting to a unilateral provision inserted in a bill of lading.

To allow such a clause to stand as valid would soon spell the doom of our Carriage of Goods by Sea Act. As

interpreted and enforced by the courts of Italy and other foreign lands, it would result in decisions never contemplated by the framers of the Act.

The bills of lading containing such clauses are in effect unilateral contracts and very unfair and prejudicial to the shipper or consignee, who has no choice but to accept them. Clauses having similar intendment have been held invalid.[19]

Based on the facts in this case, Clause 27 in the bill of lading is unreasonable.

Several factors must be considered in determining whether a jurisdictional clause is reasonable or unreasonable: (1) where the contract was made, (2) how the agreement was negotiated and executed, (3) the forum in which

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[19] The Court of Appeals for the Second Circuit, in speaking of the so-called "Both to Blame" clause in a bill of lading as it relates to cargo damaged by collision between vessels, said in *United States* v. *Farr Sugar Corp. et al.*, 191 F. 2d 370, aff'd 343 U. S. 236, at page 374:

> "One other fact requires special note. The shipowners stress the consensual nature of the clause, arguing that a bill of lading is but a contract. But that is so at most in name only; the clause, as we are told, is now in practically all bills of lading issued by steamship companies doing business to and from the United States. Obviously the individual shipper has no opportunity to repudiate the document agreed upon by the trade, even if he has actually examined it and all of its twenty-eight lengthy paragraphs, of which this Clause is No. 9. This lack of equality of bargaining power has long been recognized in our law; and stipulations for unreasonable exemption of the carrier have not been allowed to stand. *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 441, 9 S. Ct. 469, 32 L. Ed. 788; *Inman* v. *South Carolina R. Co.*, 129 U. S. 138, 139, 9 S. Ct. 249, 32 L. Ed. 612; *Santa Fe, P. & P. R. Co.* v. *Grant Bros. Const. Co.*, 228 U. S. 177, 184, 185, 33 S. Ct. 474, 57 L. Ed. 787. Hence so definite a relinquishment of what the law gives the cargo as is found here can hardly be found reasonable without direct authorization of law. * * *"

the action is to be tried and, (4) the availability of witnesses.[20]

In the present case the bill of lading was prepared in the United States by an Italian shipowner and no opportunity was given to the shippers to negotiate any of its terms. These facts alone are sufficient to demonstrate the unreasonableness of Clause 27.

There are other facts which support respondent's position. By design and primarily for its own convenience, advantage and interest, the carrier seeks to litigate this claim in Genoa, Italy, where it has its main office and place of business. Thus the shipper is not only restricted to a foreign country in which to prosecute its claim but to a single city, the carrier's home port. This further points up the unreasonableness of the clause.

The petitioners argue that the case should be tried in Genoa because:

1. The vessel is owned by a Genoese corporation;

2. The vessel's crew are Italian and reside in Italy;

3. Some of the cargo was to be discharged at Genoa, Italy;

4. Proof of market value is in Genoa, Italy;

5. Proof as to the seaworthiness of the vessel is available in Italy;

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[20] *Murillo Ltda.* v. *The Bio Bio, The Paraguay, The Argentina*, 127 F. Supp. 13, 14-15:

> "Similar doubt attends availability of *forum non conveniens* in admiralty suits generally and especially ones where a United States citizen is a libelant. In any event, the factors determinative of an inconvenient forum largely turn upon identical ones involved in the unreasonableness of a stipulation limiting the tribunal to which resort may be had, and accordingly both the ground of unreasonable stipulation and that of inconvenient forum should be appraised together."

6. A general average has been declared in Italy;

7. The American shipper could have chosen an American ship on which to ship its cargo.

None of these reasons is persuasive.

That the SS. *Monrosa* is owned by a Genoese corporation cannot have any bearing on the merits of respondent's claim. Like countless other foreign vessels, it was engaged in trade between United States ports and foreign ports and thereby came within the jurisdiction of our Courts.

The petitioners had many opportunities to take the testimony of the officers and of the crew members of the *Monrosa* at the time when and subsequent to when this action was commenced. In fact, the respondent's attempts in this regard were thwarted by the vigorous efforts of the petitioners. Certainly these tactics demonstrate the unreasonable attitude of the petitioners.

That the cargo was discharged at Genoa, the forum selected by the petitioners, is not a strong argument. It will certainly be conceded that the cargo was seriously damaged. It will be respondent's burden to establish its monetary loss, which it is willing to assume in a trial in this country.

The voyage in question commenced at Houston and New Orleans and thus it must be established that on leaving those ports that the vessel was seaworthy.[21] The witnesses to be called by the petitioners on this point are its agents, stevedores and loading surveyors, all of whom are United States citizens residing in this country. It would be burdensome on both parties to litigate a case in Italy and have

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[21] 46 U. S. C. §1303—

"RESPONSIBILITIES AND LIABILITIES OF THE CARRIER AND SHIP—SEAWORTHINESS. (1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy. * * *"

to return to the United States to obtain the testimony of so many witnesses.

The fact that a general average has been declared is not involved in this litigation. If the respondent herein is correct in its contention that the vessel was unseaworthy when it broke ground at Houston and New Orleans, then, of course, there can be no general average.

The carrier's last argument demands little comment. We do not think that this court would hold that in this day of international trade that an American citizen should be forced to ship his goods on American ships. The demands of modern business are such that often times the schedules of American lines cannot meet delivery dates called for in shipper's contracts and thus it is necessary to engage other carriers. To hold that American shippers should engage American ships only would result in international ill-will.

As against the foregoing seven reasons of the petitioners, there are these circumstances, which make it more reasonable to try the action here:

(1) The SS. *Monrosa* loaded the cargoes at Houston and New Orleans;

(2) All of the testimony concerning the seaworthiness of the vessel at the commencement of the subject voyage should be available in Houston and New Orleans;[22]

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[22] *Union Carbide & Carbon Corp.* v. *United States*, 200 F. 2d 908, 910:

"The parties differ on the time which should be considered the commencement of the voyage, when the vessel should have been placed in seaworthy condition. The precedents and reason leave no doubt that as to a particular cargo it should be when that cargo is lifted, or here at Takoradi on March 31, 1945, The Southwark, 191 U. S. 1, 13, 24 S. Ct. 1, 48 L. Ed. 65; May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft, 290 U. S. 333, 342, 54 S. Ct. 162, 78 L. Ed. 348; The President Polk, 2 Cir., 43 F. 2d 695, 696, 697; The J. L. Luckenbach, D. C. S. D. N. Y., 1 F. Supp. 692, 707, affirmed 2 Cir., 65 F. 2d 570."

(3) All of the log books and other ship's papers can be readily made available to the trial court;

(4) Testimony of the ship's officers and crew could have been taken in the United States when the SS. *Monrosa* returned here on any one of her visits to U. S. A. east coast and Gulf ports.

(5) The stowage of respondent's cargoes can only be established by witnesses in Houston and New Orleans;

(6) The bills of lading covering the shipment of respondent's cargoes were issued in New Orleans and Houston;

(7) The proof as to the good order and condition of the cargoes at the time of shipment is obtainable only in the United States;

(8) The bills of lading are printed in the English language and incorporate the United States Carriage of Goods by Sea Act.

Another reason which makes Clause 27 unreasonable under the circumstances is that the Italian courts would not enforce an agreement between an Italian citizen and an American citizen which stipulated that all actions thereunder must be brought in the courts of the United States (unless the Italian citizen neither resided nor was domiciled in Italy). This is specifically set forth in Article 2 of the Italian Code of Civil Procedure, the English translation of which is as follows:

> "The Italian Jurisdiction cannot be derogated by an agreement in favour of a Foreign Jurisdiction or of arbitrators issuing their awards abroad unless the Action refers to obligations as between foreigners or between a foreigner and an Italian National neither residing nor domiciled in the Italian Republic and unless the derogation is substantiated by a written deed."

This court in *Hilton* v. *Guyot*, 159 U. S. 113, would not enforce a judgment rendered in a French court because a judgment rendered in our courts would not be given full recognition in the French courts. This court discussed the rule of reciprocity at pages 227-228:

> "The prediction of Mr. Justice Story (in §618 of his Commentaries on the Conflict of Laws, already cited) has thus been fulfilled, and the rule of reciprocity has worked itself firmly into the structure of international jurisprudence.
>
> "The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiffs' claim.
>
> "In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive."

The petitioners rely on the *Muller*,[23] the *Geisha*[24] and the *Bio Bio*[25] cases to support their position that Clause 27 is

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[23] 224 F. 2d 806 (2 C. A.), cert. denied 350 U. S., 903 (1955).

[24] 187 F. 2d 990 (2 C. A.).

[25] 227 F. 2d 519, aff. 127 F. Supp. 13.

reasonable. All those cases are clearly distinguishable from the instant case. In the *Muller* case, the cargoes were loaded at Gothenburg on the SS. *Oklahoma,* a Swedish flag vessel owned by a Swedish corporation, to be discharged at Philadelphia. The *Oklahoma* never arrived in the United States, as it was lost at sea.

In the *Geisha* case the cargoes were loaded on board that vessel in Peru and were to be discharged at certain European ports. The vessel did not touch any port of the United States nor was any part of the contract of carriage performed in the United States.

In the *Bio Bio* case, the cargoes were loaded on three Swedish flag vessels at Antwerp, Belgium, and were to be discharged at Arica, Chile. As in the *Geisha* case, the vessels did not touch any port of the United States nor was any portion of the contract of carriage performed in the United States.

The Court of Appeals for the Second Circuit in the *Muller* case, *supra,* recognized that parties cannot oust a United States Court of jurisdiction by agreement and unambiguously held that each case must be judged on its own facts.[26] In other words that court was considering the jurisdictional clause together with the *forum non conveniens* theory.

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[26] 224 F. 2d 806, 808 "* * * From this it follows that in each case the enforceability of such an agreement depends upon its reasonableness. We agree with the appellant to this extent: the parties by agreement cannot oust a court of jurisdiction otherwise obtaining; notwithstanding the agreement, the court has jurisdiction. But if in the proper exercise of its jurisdiction, by a preliminary ruling the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented. Such, essentially, was our holding in Cerro De Pasco Copper Corp. *v.* Knut Knutsen in the case of The Geisha, 2 Cir., 187 F. 2d 990. We adhere to that ruling."

The same principle was declared in the *Geisha*[27] and *Bio Bio*[28] cases.

It is important to note that in all three cases the testimony and documents pertaining to the main issues, i.e., stowage of cargo, seaworthiness of the vessel, condition of the cargo, issuance of bills of lading, and all other important matters could be obtained only outside the United States.

Notwithstanding the three decisions referred to, the courts in the Second Circuit are reluctant to enforce jurisdictional clauses.[29]

In the instant case all of the testimony as to stowage of cargoes, issuance of bills of lading, seaworthiness of the vessel, condition of the cargoes, is available right here in the United States.

In *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, this court discussed the theory of *forum non conveniens* and set forth certain criteria at pages 508 and 509:

> "* * * Important considerations are the relative ease of access to sources of proof; availability of

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[27] 187 F. 2d 990, 991 "* * * The court's conclusion that it was not the appropriate forum clearly did not constitute an abuse of discretion, considering these facts stated by the district judge: 'No loading of this vessel took place in any United States port. All of the cargo was to be delivered in European ports * * *. None of the crew of the Geisha are in the United States and none are planning to visit the United States'."

[28] 127 Fed. Supp. 13, 16 "In the light of all of the connecting factors, the reasonableness of the limitation of tribunal to the carrier's domicile is apparent. There is no reason why this court ought not to give it consideration. Weighing thus this stipulation in the balance of conveniences, respondents have sustained the burden of making out the inconvenience of this forum."

[29] Chemical Carriers Inc. v. L. Smit & Co's Internationale Sleepdienst 154 F. Supp. 886, 888: "It is no longer the law that contractual provisions which purport to limit a jurisdiction which would otherwise attach are void and unenforceable. (Cases cited) Nevertheless, such agreements, particularly those calling for exclusive jurisdiction in a foreign court, are not looked upon with favor and will not be enforced by the Federal courts if they are unreasonable in themselves or in the effect they may have on the rights of the parties to the dispute. (Cases cited)"

compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

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"* * * There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."

Applying the rules of the *Gilbert* case, the trial of this action should be conducted in the District Court in Texas. As shown, most of the testimony pertaining to the issues must be obtained in Houston and New Orleans. In addition, the United States Carriage of Goods by Sea Act, which is incorporated in the bill of lading (Clause 32 of the bill of lading R. 25), is the prevailing law and as stated in the *Gilbert* case, it should be decided by United States courts and not by Italian courts.

The reasoning of the *Gilbert* case was affirmed in *Koster* v. *(American) Lumbermens Mutual Casualty Co.*, 330 U. S. 518, at pages 524 and 525.[30]

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[30] "Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice. He should not be deprived of the presumed

The District Courts sitting in admiralty will rarely decline to take jurisdiction of an action which is commenced by an American citizen.[31]

It can be readily realized why the United States Court of Appeals for the Fifth Circuit, after considering all of the facts, held that this action must be tried in this country (R. 51-52).

The cause of action *in rem* must be heard and determined by the District Court.

It is admitted that this action is *in rem* and *in personam* (pages 2 and 3 of petitioners' brief).

Before any consideration should be given to the petitioners' request that Clause 27 be enforced and the American shipper be relegated to Italian courts, it must be first determined if the provisions thereof apply to *in rem* actions. This clause must be strictly construed in accordance with the law of contracts.

Clause 27 says in substance that no legal proceedings against the "Captain or Shipowners or their Agents" shall be brought in any court except those located in Genoa,

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advantages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or non-existent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems. In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown.

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"While, even in the ordinary action, the residence of the suitor will not fix the proper forum without reference to other considerations, it is a fact of 'high significance.' *International Milling Co.* v. *Columbia Transportation Co.*, 292 U. S. 511, 520. * * *"

[31] The Suadades, 67 F. Supp. 820.

Italy. It does not speak of any prohibition to an action against the vessel itself—a remedy recognized by all maritime nations. This glaring omission can only mean that such actions are maintainable in all jurisdictions.

Our courts have always recognized an *in rem* cause of action by a cargo owner. This procedure is not just a device to obtain security as the petitioners herein contend. In admiralty the vessel is held responsible for damage just as any other legal person. To argue otherwise is either an attempt to mislead this court or is a misunderstanding on the part of the petitioners as to the remedies available to aggrieved cargo owners. The admiralty rules point up the separability of *in personam* and *in rem* actions and provide for service of process in each;[32] our law reports are replete with decisions on this point.

An action *in rem* is peculiarly useful in the admiralty. The ship which does the damage may sail away and may not return for years, if ever. Actions against the foreign vessel owner *in personam* may prove an idle gesture even though the owner may ultimately be found. In such instances a direct action against the offending vessel herself offers the only effective remedy to the owner of the cargo.

The *Maggie Hammond*, 76 U. S. 435, (decided in 1869) discussed the reciprocal obligations of cargo and vessel at pages 449-450:

> "Undoubtedly the owner of the cargo has a lien, by the maritime law, upon the ship for the safe custody, due transport, and right delivery of the same, as much as the shipowner has upon the cargo for the freight, as expressed in the maxim, *Le batel est obligé*

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[32] "28 U. S. C.—Admiralty Rules
"Rule 2.
"Rule 10."

à la marchandise et la marchandise au batel. Subject to the exception that the lien of the shipowner may be displaced by an unconditional delivery of the goods before the consignee is required to pay the freight, or by an inconsistent and irreconcilable provision in the charter-party or bill of lading, the rule is universal as understood in the decisions of the Federal courts, that the ship is bound to the merchandise and the merchandise to the ship for the performance on the part of the shipper and shipowner of their respective contracts.

"Shipowners contract for the safe custody, due transport, and right delivery of the cargo, and for the performance of their contract the ship, her apparel and furniture, are pledged in each particular case, and the shipper, consignee, or owner of the cargo, contracts to pay the freight and charges, and to the fulfilment of their contract the cargo is pledged to the ship, and those obligations are reciprocal, and the maritime law creates reciprocal liens for their enforcement."

The above principle is ingrained in maritime law and is found in recent cases such as *Motor Distributors Ltd. et al.* v. *Olaf Pedersen's Rederi A/S*, 239 F. 2d 463,[33] cert. denied 353 U. S. 938, rehearing denied 353 U. S. 989 and *Pioneer Import Corporation* v. *The Lafcomo et al.*, 138 F. 2d 907, 908,[34] cert. denied 321 U. S. 766.

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[33] At page 467 the court said:

"Moreover, something deeply significant in the whole field of maritime law is here at stake. With respect to ocean-going carriers, it seems that one of the most universally recognized rules of law is that which gives the right to libellant, possessing a maritime lien against a vessel, to proceed *in rem* in the jurisdiction where the vessel is found."

[34] "* * * The ship was thus unseaworthy in respect to its carriage (cases cited). Both respondent and the vessel are therefore liable; the maritime lien against the ship for safe carriage obtains whether or not it was under charter. *The Maggie Hammond*, 9 Wall. 435,

There is nothing unique in joining a cause of action *in rem* with one *in personam* for cargo damage. No objection is found either in the admiralty rules[35] or case law. In fact, this consolidation is encouraged.

In *Newell* v. *Norton and Ship*, 70 U. S. 257, this court by Mr. Justice Grier held at page 266:

> "The libel in this suit was originally against the steamboat Hill, and against the master, who was part owner, and, also, against the pilot. It was amended in the District Court by dismissing it as to the pilot, and sustained as against the vessel and the master, or owner. The allowance of this amendment was within the discretion of the court, and was very proper. The objection that a libel *in rem* against a vessel, and *in personam* against the owner, cannot be joined, was properly overruled; as it was in conformity with the 15th rule in admiralty as established by this court."

This court's ruling was followed in subsequent cases such as *Turner* v. *United States*, 27 F. 2d 134, 135-136[36]

449, 450, 76 U. S. 435, 19 L. Ed. 772; Taylor Bros. Lumber Co. *v.* Sunset Lighterage Co., 2 Cir., 43 F. 2d 700, 701; *The Esrom*, 2 Cir., 272 F. 266, 271, certiorari denied 257 U. S. 634, 42 S. Ct. 47, 66 L. Ed. 408."

[35] 28 U. S. C. Admiralty Rules.

[36] "In Homer Ramsdell Transp. Co. *v.* La Compagnie Generale Transatlantique, 182 U. S. 406, 411, 21 S. Ct. 831, 833, 45 L. Ed. 1155, the court said: 'At common law, no action can be maintained against the owner of a vessel for the fault of a compulsory pilot.' The pending of a libel *in rem* is not a bar to a suit *in personam* arising out of the same facts. Proceedings *in rem* and proceedings *in personam* are permitted to be joined in one cause of action, where the admiralty rules do not prohibit it. If the right against the ship and that against the owner are mutually coextensive, it would be difficult to justify cases permitting the two actions. Newell *v.* Norton, 3 Wall. 257, 18 L. Ed. 271; Planet Venus (D. C.) 113 F. 387; La Normandie (C. C. A.) 58 F. 427; Providence, etc. Ins. Co. *v.* Wager (D. C.) 35 F. 364. * * *"

and *Pioneer Import Corporation* v. *The Lafcomo et al.*, (*supra*).

The petitioners, in arguing that Clause 27 includes *in rem* actions, attempt to broaden the language of the clause to include a non-existing provision and are really requesting that the bill of lading be rewritten for their own benefit. This the courts will not do.[37]

A reading of the entire bill of lading proves that the carrier was fully cognizant of the difference and distinction between the terms "shipowner," "ship," and "captain."

The bill of lading itself restricts the word "steamship" in this language (R. 13):

> "The word 'steamship' or 'steamer' as used in this form of bill of lading is understood to include and to stand for a 'motor ship' as the case may require."

Clause 35 of the bill of lading (R. 27)[38] clearly demonstrates that the petitioners understood that actions *in rem* and *in personam* are not synonymous and that an *in rem* action cannot be effected until process issues against the "ship" even though jurisdiction had been obtained over the "carrier" (shipowner).

Other clauses in the bill of lading which distinguish "ship" and "shipowner" are found in the first paragraph

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[37] It was held in *Shell Oil Co.* v. *Manley Oil Corporation*, 124 F. 2d 714, 715, cert. denied 316 U. S. 690:

"• • • Courts are not authorized to make contracts for the parties, but must construe them as written, and where plain, common words are used in their ordinary meaning, they must be accepted in that sense. • • •"

[38] "35.—In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought until jurisdiction shall have been obtained over the carrier and/or the ship by service of process or by an agreement to appear."

of page 16 of the record and clauses 15, 17, 23, 24, 25 (R. 22, 24) as well as Clause 27.

The Carriage of Goods by Sea Act, which is incorporated in the bill of lading by Clause 32[39] (R. 25), makes a distinction between "carrier" ("shipowner") and "ship," 46 U. S. C. Section 1301:

> "(a) The term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper.
>
> • • • • • •
>
> "(d) The term 'ship' means any vessel used for the carriage of goods by sea."

The terms and conditions of the bill of lading must be strictly construed against the petitioners since they alone prepared and printed the document. This is a basic principle of law[40] and is rigidly applied when, as in this case, a common carrier inserts a clause in a bill of lading for its own advantage.

In *Compania de Navigacion La Flecha* v. *Brauer*, 168 U. S. 104, Mr. Justice Gray at page 118 discussed this point:

> "Exceptions in a bill of lading or charter party, inserted by the shipowner for his own benefit, are unquestionably to be construed most strongly against him. *The Caledonia*, 157 U. S. 124, 137; *The Majestic*,

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[39] "32.—This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further."

[40] *Noonan* v. *Bradley*, 76 U. S. 394, 407; *Grace* v. *American Central Ins. Co.*, 109 U. S. 278, 282; *Alcoa S. S. Co.* v. *United States*, 338 U. S. 421, 424-425; 17 *Corpus Juris Secundum*, pp. 751-753 (Section 324).

166 U. S. 375, 386; *Norman* v. *Binnington*, 25 Q. B. D. 475, 477; *Baerselman* v. *Bailey* (1895) 2 Q. B. 301, 305."

The Court of Appeals for the Ninth Circuit in *Pope & Talbot, Inc.* v. *Guernsey-Westbrook Co.*, 159 F. 2d 139, 141, recognized the disadvantage in which a shipper is placed in accepting the carrier's printed bill of lading:

> "It is true that other constructions more favorable to the carrier may be conceived, but it is the seller-carrier's printed document, in whose framing the buyer had no part, which is under construction. The usual rule applies that if ambiguous inferences of its terms are rationally conceivable, that one controls which is favorable to the buyer-shipper (Citing cases)."

The United States Court of Appeals for the Second Circuit made similar rulings in *Lines* v. *Atlantic Transport Co.*, 223 Fed. 624, 625[41] and *U. S.* v. *Farr Sugar Corp.*, 191 F. 2d 370, 374, affirmed 343 U. S. 236.[42]

The petitioners say that in the *Muller*, *The Geisha* and *The Bio Bio* cases, no mention was made of *in rem* actions in the jurisdictional clauses and that the courts did not find it necessary to distinguish between *in personam* or *in rem* actions.

In none of those cases was jurisdiction ever obtained over the vessel and thus this vital point was not considered. In the *Muller* case, the vessel carrying the cargo was lost at sea as was found by the United States Court of Appeals

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[41] "Being ambiguous, and its object being to relieve a carrier from its legal obligation, we think it should be construed against the carrier. If he has not made his exception clearly and unmistakably in the form our courts recognize as valid, he has not made one he can enforce here."

[42] See footnote (19)

for the Fifth Circuit (R. 49). In *The Geisha* case, the vessel was not named as a respondent and the action was *in personam* only.

Contrary to the petitioner's erroneous impression there was no *in rem* action in *The Bio Bio* case. The court records have been searched in this case and no Claim of Owner or bond is on file. In addition, there was no letter of guarantee or any other agreement signed by any of the parties that the vessel would appear in the action. The mere mentioning of a vessel as a respondent does not perfect an *in rem* cause of action. Jurisdiction must be obtained over the vessel by service of process or there must be an agreement to appear on behalf of the vessel, as provided for in the Admiralty Rules.[43] These very requirements are set forth in Clause 35 of the bill of lading (R. 27).

The petitioners contend that the District Court which decided *The Bio Bio*[44] case recognized that there were *in rem* and *in personam* causes of action. They quote as follows from Judge Murphy's decision at page 14:

> "Respondents do not question, upon appearance and oral argument or in brief, the jurisdiction of this court either over their persons * * * or the subject matter of this controversy.* * *" (Page 27 of petitioners' brief).

Conveniently and evidently intentionally, the petitioners omitted a very important part of this sentence which reads: "(process was served at their office where business is being done within this judicial district)". These words appear in the decision after the word "persons." Thus the entire sentence reads:

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[43] 28 U. S. C. Admiralty Rules, Rule 10.

[44] 127 F. Supp. 13.

"Respondents do not question, upon appearance and oral argument or in brief, the jurisdiction of this court either over their persons (process was served at their office where business is being done within this judicial district) or the subject matter of this controversy. * * *"

It is evident that Judge Murphy was speaking about *in personam* actions only. There is not one mention in that case or for that matter in the *Muller* or *The Geisha* cases of an *in rem* cause of action.

We would also like to correct a further misinterpretation by the petitioners of *The Bio Bio* case. The Court of Appeals did not interpret the clause but merely affirmed, in a one sentence opinion, the lower court's decision.[45] It never discussed either an *in rem* or an *in personam* cause of action. It is obvious that the petitioners are attempting to bolster their weak argument by basing unfounded and unsupportable inferences upon inferences.

In our research we have been unable to uncover any reported case wherein any court enforced a clause similar to Clause 27 where (1) cargo had been shipped from the United States; (2) an action had been commenced by an American citizen and (3) jurisdiction had been obtained over a vessel and an *in rem* action had been perfected.

It is claimed by the petitioners that *in rem* and *in personam* actions are the same proceeding and cannot be divorced, citing *Smith* v. *The Mormacdale,* 198 F. 2d 849; *Bennett* v. *SS. Mormacteal,* 254 F. 2d 138 (Affirmed 160 F. 840), cert. denied 79 S. C. 26 (October 13, 1958) and *Samuels* v. *Munson Steamship Line,* 63 F. 2d 861. These cases are not in point and have no application here. In each

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[45] 227 F. 2d 519 "127 F. Supp. 13, affirmed in open court on the authority of W. H. Muller & Co. *v.* Swedish American Line, Ltd., 2 Cir., 224 F. 2d 806."

one of those cases the libelant was a longshoreman who brought an action *in rem* to recover for personal injuries. In each of those cases the libelant-employer was also the vessel owner. The rights of a longshoreman are governed by the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. Code §901 and following. Section 905 in substance provides that the remedies set forth in section 904 are exclusive to the longshoremen and the other persons stated therein. The courts in all three cases held that longshoremen could not proceed against their employers in any way other than specified in Section 904.

The ruling in those cases was clearly explained in *Central Railroad Company of New Jersey* v. *Burns Bros.*, 202 F. 2d 910, at page 913:

> "• • • *Smith* vs. *The Mormacdale*, 198 F. (2d) 849 (3CA) and *Samuels* vs. *Munson SS. Co.*, 63 F. 2d 861 (5CA), on which the Central Railroad relies, are irrelevant; they decided no more than that in the Longshoremen's and Harbor Workers' Compensation Act, Congress meant to make exclusive the liabilities that it imposed. • • •"

In other words, those courts did no more than construe a federal statute.

In the case now before this court, the question is an interpretation and validity of a contract.

Thus for the many reasons demonstrated above, the *in rem* action perfected at the outset of this litigation, we submit, should be maintained in and determined by the District Court.

Conclusion.

For the reasons stated it is respectfully submitted that the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed and that the cause be remanded to the United States District Court for the Southern District of Texas, Houston Division, for further proceedings.

Respectfuly submitted,

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SUPREME COURT, U. S.
MOTION FILED FEB 13 1959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 178

SS "MONROSA", her engines, tackle, etc. and NAVIGAZIONE ALTA ITALIA,

Petitioners,

— versus —

CARBON BLACK EXPORT, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Motion for Leave to File a Brief as Amicus Curiae

The American Institute of Marine Underwriters hereby respectfully moves for leave to file the brief *amicus curiae* annexed. The consent of the attorney for the respondent has been obtained. The consent of the attorney for petitioners was requested but refused.

The interest of American Institute of Marine Underwriters in this case arises from the fact its members insure cargoes carried to or from United States ports, and their rights of subrogation, and, as a consequence the premiums to be paid by American cargo interests, are gravely affected by the issue before the

Court, namely, whether a carrier may provide in a bill of lading subject to the United States Carriage of Goods by Sea Act that suit for breach thereof may be brought only in the courts of a foreign country.

In the instant case respondent ably presented in the Court of Appeals the reasons why such ouster of the jurisdiction of American courts is invalid, but did not consider the legislative history supporting this position. Since respondent may also omit reference to this matter in this Court, it is believed that the attached brief which *amicus curiae* is requesting permission to file, will contain additional argument on the question to be decided. If this argument is accepted, it would be dispositive of this case.

Respectfully submitted,

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February 11, 1959

IN THE

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OCTOBER TERM, 1958

No. 178

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— versus —

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE

Interest of Amicus Curiae

American Institute of Marine Underwriters is an association of underwriters who, among other activities, insure cargo moving in international commerce subject to the Carriage of Goods by Sea Act, 49 Stat. 1207 (1936), 46 U. S. C. §§ 1300-15 (1952), hereinafter described as COGSA. The uniformity in carriers' obligations which this Act was designed to create, is threatened by clauses inserted in bills of lading seeking to oust American courts of jurisdic-

tion, causing variation of risk, complicating determination of premiums and increasing expense to cargo interests.

Summary of Argument

Recognizing the inherent inequality of cargo shippers in dealing with carriers, Congress, by the Carriage of Goods by Sea Act, established minimum obligations of common carriers engaged in transporting goods to or from United States ports in foreign trade. By the device of a contractual provision in their forms of bills of lading purporting to oust American courts of jurisdiction, carriers are attempting to evade these obligations and to defeat the legislative intent.

ARGUMENT

I

A contractual limitation on the choice of forum violates public policy. As a shipper is powerless to vary the terms of a bill of lading offered to him, he must be protected against a contractual restriction of the forum which benefits solely the carrier.

It has long been established that an agreement restricting a litigant's right to sue in any appropriate forum is unenforceable. *Insurance Company* v. *Morse*, 87 U. S. 445 (1874). Although conceding this, the Court of Appeals for the Second Circuit in *Wm. H. Muller & Co., Inc.* v. *Swedish American Line Ltd., et al.*, 224 F. 2d 806 (2d Cir.), *cert. denied* 350 U. S. 903 (1955), held such an agreement to be valid

unless unreasonable. The restriction under consideration in that case appeared in a bill of lading issued in Sweden covering the carriage of goods from Sweden to the United States, subject to COGSA. Believing that American law would be applied properly by the Swedish courts, to which jurisdiction was limited by the bill of lading provision, the Court of Appeals upheld the ouster of jurisdiction, leaving the American cargo owner to sue the Swedish carrier in a Swedish court.

Apparently recognizing that the agreement limiting the forum could not be reasonable unless the shipper's consent thereto "was freely given", the Court of Appeals found in *Wm. H. Muller & Co., Inc.* v. *Swedish American Line Ltd., et al.*, supra, that "for aught that appears" that condition had been met, ignoring the vast difference in the bargaining power of the parties. Maritime history shows that cargo interests are unable, except through legislation, to obtain transportation on reasonable terms. Knauth, *The American Law of Ocean Bills of Lading* (4th ed. 1953), p. 119. Because of the unequal bargaining power of shipper and carrier, Congress found it necessary, first in 1893 through the Harter Act, 27 Stat. 445 (1893), 46 U. S. C., §§ 190-196 (1952), and then in 1936 through COGSA, to support the shipper by defining the carrier's responsibilities, which it significantly provided could be increased, but not diminished. Gilmore and Black, *The Law of Admiralty* (1957), p. 125.

In view of the superior bargaining power of the carrier, it cannot be assumed that a shipper has freely agreed to a clause appearing in the fine print of a bill of lading limiting suit for cargo loss or

damage to the courts of the foreign country of the ship's flag or, as in the present case, to the court in a certain foreign city where the carrier has its principal office. As no possible advantage can accrue to the cargo owner by a restriction on its right to sue the carrier in any forum where jurisdiction can be secured, the fact that the bill of lading contains such a restriction is of itself indicative of the relative bargaining power of the parties and emphasizes the unreasonableness and one-sided nature of the restriction.

When it is further considered that in most cases the party which seeks to recover for loss or damage to cargo is not the shipper but the consignee, who first learns of the terms of the bill of lading after the goods have been paid for through an irrevocable letter of credit, the evil of the clause becomes even clearer.

One of the purposes of Congress in passing the Carriage of Goods by Sea Act was to free interested parties from concern as to the provisions of the contract of carriage. The Act was intended to produce "uniformity and simplification of bills of lading" which "will be of immense value to shippers who will be relieved of the necessity of closely examining all bills of lading to determine the exceptions contained therein to ascertain their rights and liabilities; to underwriters who insure the cargo and are met with the same difficulties; and to bankers who extend credit upon the bills of lading." H. Rep. No. 2218, 74th Cong., 2d Sess.

In the present case, the bill of lading contract provides that the rights of the parties shall be gov-

erned by COGSA. When a foreign court is to interpret United States law, it has the disadvantage of not being able to recognize our law judicially: it must be established as a fact through the testimony of experts. This increases the chance of error, even if the foreign country in which the court is sitting has adopted the Hague Rules, as it seems reasonable to assume that the judge may be influenced by the national interest.

A bill of lading restriction of forum is inequitable in that it fails to provide a corresponding surrender of the carrier's privilege of choosing the forum in which to sue the cargo owner for freight, or general average contribution. The restriction serves only the convenience of the carrier by corralling all cargo suits into its home territory.

As a substantial number of the cargoes which may be the subject of suit will not have been shipped to or from ports in the foreign country where suit is required, the forum provided for in many instances would not be acceptable under the principles of *forum non conveniens*, as would be an American court sitting at the port of shipment or discharge. If the American forum is not in fact convenient, the doctrine of *forum non conveniens* will protect the carrier from burdensome litigation.

It seems probable that, with the exception of ocean bills of lading, contractual limitations of the choice of forum will appear but infrequently. In view of the constant stream of bills of lading issued by a common carrier, the potential litigation as to the reasonableness of the restriction is substantial, and

the ingenuity of counsel in exhibiting the unfairness of the restriction as applied to the facts at hand will be at a premium.

II

Congress' intention that United States law shall regulate shipments to or from United States ports may be thwarted by enforcing an agreement to sue abroad, as there is no certainty that COGSA will be applied.

Congress has unmistakably provided that COGSA shall govern all ocean bills of lading pertaining to cargo contracted to be carried to or from United States ports in foreign trade. 46 U. S. C. §1300. By providing in the bill of lading that suit for cargo loss can only be brought in a foreign court, a carrier may escape having its responsibilities determined according to United States law.

There is much opportunity for a foreign court to be misled in face of the many conflicting provisions in the usual bill of lading. COGSA may not be mentioned at all and, if it is, there may be a provision that foreign law shall also control the rights of the parties. Knauth, *op. cit.*, supra, p. 161.

The foreign court is not bound by legislative fiat to apply COGSA, and there is no appeal to an American court from a foreign court which applies foreign law instead. As no American court can guarantee that a foreign court will apply COGSA, the owner of a shipment should not be required to litigate his rights in a foreign court. To carry out the legis-

lative purpose of having all disputes involving damage to such cargo resolved according to the standard laid down by COGSA, requires the voiding of a clause denying the cargo owner the right to try his case in an American court, where it is certain COGSA will prevail.

III

Where carriage is to the United States, the conflict between the laws in effect at the ports of shipment and discharge will be resolved by a foreign court in favor of foreign law. A clause requiring suit abroad thus excludes application of our law to import shipments, contrary to the purpose of Congress.

A shipment moving in international trade encounters two systems of law. Under the usual conflicts rule, the law of the place of contract governs, causing foreign law to apply to shipments bound for U. S. ports. *E. Gerli & Co.* v. *Cunard S. S. Co. Limited,* 48 F. 2d 115 (2d Cir. 1931); note, *Ocean Bills of Lading and Some Problems of Conflict of Laws,* 58 Colum. L. Rev. (1958), p. 216. Congress has made it mandatory for United States courts to fix the responsibilities of the carrier in accordance with United States law. COGSA, Sect. 1300. The courts of other nations have received a legislative mandate to apply their own version of the Hague Rules in respect of export shipments. Knauth, *op. cit.*, supra, pp. 156, 453. The courts of the remaining maritime nations may be expected to apply their own law.

As to cargo destined for a United States port, a clause requiring suit abroad thus, in effect, provides

that foreign law shall govern to the exclusion of COGSA. Such a clause will have the same effect as to cargo exported from the United States to any of several European nations, which apply their own legislation where shipment was made from a country which has adopted the Hague Rules. Knauth, *op. cit.*, supra, p. 156.

That it is advantageous to a carrier to have its own foreign law apply is clear, even where the Hague Rules are in force. Aside from whether foreign interpretation of the applicable sections of the Hague Rules may be more favorable, each of the foreign versions of the Hague Rules limits the carrier's liability to a certain amount per package expressed in the money of the country in question. Knauth, *op. cit.*, supra, p. 283. In the present case, where effort is made to force the cargo owner to litigate in Italy, the Italian version of the Hague Rules limits the carrier's liability to 2500 Italian lira per package or approximately $10. Knauth, *op. cit.*, supra, p. 287. Versions of the Hague Rules adopted in various foreign countries set various limitations on the carrier's liability, and, except in the case of Canada, the limitation per package is far less than the $500 provided by COGSA. In Sweden, which was the country in interest in *Wm. H. Muller & Co., Inc.* v. *Swedish American Line Ltd., et al.*, supra, the limitation is the equivalent of $347; in England, $280; in France, $142.50. The limitation in the Italian version of lira equal to $10 per package, is the lowest of all.

Since a clause requiring suit in a foreign court applying the law of the forum will bring about limitation of the carrier's liability to a smaller sum than permitted by COGSA, such clauses, we submit, contravene 46 U. S. C. §1308 of that Act and are void.

IV

Requiring suit in a foreign court is tantamount to providing that a foreign limitation statute shall measure the carrier's liability. As such statutes guarantee a maximum liability not provided in our statute, the clause requiring suit abroad is void as lessening the carrier's liability in violation of Section 8 of COGSA.

One of the privileges reserved by COGSA to a vessel owner is to limit liability in accordance with the United States limitation statute in effect when loss occurs. See 46 U. S. C. §1308. This sanctions a lessening of liability where loss occurred without the privity or knowledge of the vessel owner and the total claims exceed the value of the vessel and her pending freight.

By requiring cargo interests to sue abroad, the carrier secures the benefit of a foreign limitation statute, usually the uniform Convention executed at Brussels August 25, 1924, the terms of which an American court may judicially notice. *Black Diamond Steamship Corp.* v. *Robert Stewart & Sons, Ltd. et al.*, 336 U. S. 386, 1949 AMC 393. The uniform Convention limits the owner's liability to the value of the vessel plus freight, but not to exceed 8 pounds sterling per ton, which at the present rate of exchange equals $22.40 per ton, as contrasted with the Canadian limit of $38.92 per ton. Knauth, *op. cit.*, supra, 283, 444. The benefit to the carrier of the uniform Convention is graphically demonstrated in *Black Diamond Steamship Corp.* v. *Robert Stewart & Sons, Ltd. et al.*,

supra, where cargo might recover only $325,000 under the Convention, but $1,000,000 under the American statute. On being challenged by the carrier in a court sustaining the ouster of jurisdiction where reasonable, the cargo owner is not likely to have sufficient information of the claims which might be filed to establish that by virtue of the foreign limitation statute the recovery will be less than it would otherwise be under COGSA.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be affirmed.

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February 11, 1959

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No. 178

IN THE

Supreme Court of the United States

October Term, 1958

SS MONROSA, HER ENGINES, TACKLE, ETC., AND NAVIGAZIONE ALTA ITALIA, *Petitioners*

-versus-

CARBON BLACK EXPORT, INC., *Respondent*

ON WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit

PETITION FOR REHEARING

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-versus-

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ON WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

Petitioners pray that this Court grant rehearing of its order of March 30, 1959, dismissing the writ of certiorari granted October 13, 1958 (358 U.S. 809) to review the judgment of the Court of Appeals for the Fifth Circuit in the above-entitled case (as reported at 254 F. 2d 297), after oral argument was heard on March 3, 4, 1959, reverse the judgment of the Court of Appeals below and reinstate the Final Decree of the District Court.

REASONS FOR GRANTING REHEARING

1. The Court's opinion in this case leaves completely unanswered the principal and primary issue which has not only existed in this case from its inception, but has been recognized as such by all parties and all courts who have considered this matter—that is, is an agreement to adjudicate claims for cargo damage in a foreign jurisdiction void as contrary to public policy?

To postpone until another day the ultimate decision of this most important question of admiralty law is but to leave in a state of non-uniformity the admiralty law which this Court constantly seeks to keep uniform for it leaves unresolved the basic conflict between the decision of the Court of Appeals below and the Court of Appeals for the Second Circuit in the Muller case.[1]

To decide this question now would not be a purely administrative or managerial resolution of this conflict but a real judicial function as there is presently pending on the docket of the District Court below a motion by these same Petitioners involving this precise question,[2] the decision of which has been deferred awaiting this Court's decision of the question. The motion now pending in that case before the District Court below involves a similar shipment of carbon black stored in the same hold of the same ship and damaged at the same time and in the same manner as the carbon black of the Respondent herein. Petitioners' Motion to Decline Jurisdiction in the case pending in the District Court below is based on exactly

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[1] 224 F.2d 806 (2 C.A.), cert. denied 350 U.S. 903 (1955).

[2] A.D. No. 1458, Insurance Company of North America v. SS MONROSA and Navigazione Alta Italia.

the same grounds relied on in this case but does not involve the *in rem* issue on which this Court has decided this case, for *in rem* jurisdiction has not been obtained over the SS MONROSA and cannot now be obtained as the vessel is laid up in Italy and is not expected to return to the United States. Thus the District Court is without an authoritative decision resolving the conflict on this important question relating to *in personam* jurisdiction between the Courts of Appeals of the Second and Fifth Circuits.

If the Court does not now decide this question, it is undoubtedly only a matter of the time required in the case pending in the District Court below to progress through the Court of Appeals before this Court will be squarely presented with precisely this same question. So much interest has been shown by other admiralty lawyers in this country on this important issue that counsel for Petitioners would not be surprised to see the question presented even before the case pending in the District Court below can reach this Court.

The question has been fully briefed and argued and it is respectfully submitted that sound judicial functioning requires a resolution of this question without further delay.

2. The majority opinion dismissing the writ expressly states that certiorari was granted so that this Court could pass upon the enforceability of jurisdictional clauses in ocean bills of lading in the following terms:

> "While the parties were entitled to have the judgments of the Courts below as to whether the libel in personam was also maintainable, we do not believe it a proper exercise of our discretionary jurisdiction to pass on that aspect of the case, which alone presents the question which led us to grant certiorari." (pps. 3 and 4 of the majority opinion).

However, the unquestionable presence of the *in rem* aspect of this case was readily apparent in the certiorari papers (page 2 of the dissent) and the distinct possibility must have been apparent to this Court upon granting the writ initially that it might ultimately decide the case on the *in rem* portion alone since not only the certiorari papers but the briefs of the parties show that the Questions Presented were both as to the *in personam* and *in rem* aspects of the case.

In order to have the enforceability of such jurisdictional clauses in ocean bills of lading judicially determined Counsel for Petitioners would conservatively estimate that the parties have spent approximately $15,000 to bring this case before the Court for its decision because of their sincere beliefs that the national and international importance of the enforceability of such agreements should be settled by this Court. The far reaching importance of the question which the Court declines to decide in its opinion is graphically illustrated by the proceedings of the Maritime Law Association of the United States which formed a special committee from its membership to consider decisions of the Court of Appeals for the Second Circuit regarding such jurisdictional clauses. The proceedings of this Committee of the Maritime Law Association of the United States before the membership of the Association in its documents Nos. 403, 409 and 414 at the Association's fall meeting on November 9, 1956, the fall Committee report dated October 29, 1957 and the proceedings in the fall meeting of November 8, 1957, respectively, are appended hereto as Appendices A, B and C. Particular attention is directed to Appendix A, infra p. 13, from Document No. 403, where there is a specific reference to the then pending decision of the District Court below, and to the decided

probability that this question would be decided by this Court in this case, and to Appendix B, infra p. 22, from Document No. 409 which includes a proposed amendment to the Carriage of Goods by Sea Act to cover this question.

Further activity of the Maritime Law Association has been deferred awaiting this Court's decision of the question in this case.

These documents strikingly reflect not only the importance of this question to the Admiralty Bar of this country, but the almost equally divided views of the Admiralty Bar on it. An authoritative decision from this Court is needed to settle these differences.

3. The opinion of this Court fails to consider whether or not the District Court's order in declining jurisdiction is sustainable under the doctrine of forum non conveniens, without regard to the agreement. Petitioners' Motion to Decline Jurisdiction (R. 10-11) seeks a declination of jurisdiction on the alternate ground of forum non conveniens. Petitioners have argued and presented to the Court that the order of the District Court in declining jurisdiction is enforceable under the District Court's inherent powers to decline jurisdiction in Admiralty cases on the basis of forum non conveniens, *whether it be as to the in rem libel or the in personam action.* (Reply brief for Petitioners, Pages 21-23). The majority's opinion clearly indicates that the writ is being dismissed solely because the majority of the Court finds that the agreement did not extend to the *in rem* portion of the libel. However, the majority completely disregards whether or not the agreement is enforceable as to the *in rem* portion on the grounds of forum non conveniens. Petitioners have sought the re-

versal of the Court below and the reinstatement of the District Court's order both as to the *in rem* and *in personam* actions on the alternate ground that it is supportable under the doctrine of forum non conveniens and Petitioners are entitled to have this Court pass upon and decide this question. There can be no question but what it was before the Court upon the granting of the writ and was not determined before the Court dismissed the writ. Hence on this ground alone the writ was improperly dismissed.

4. The decision of the majority that Respondent may proceed with a trial of the *in rem* action independently of the *in personam* action is clearly wrong in view of the jurisdictional agreement. While it is clear in the Admiralty Law in this country that under certain circumstances the holder of a maritime lien may pursue a vessel independently of the ship's owner, it is equally clear that the fiction of the personification of a ship, as the law of maritime liens developed in this country, arose to prevent injustices, by permitting a party aggrieved, by tort or breach of contract to obtain restitution not available *in personam*. Respondent seeks to utilize the fiction to avoid a contract to which it assented, for in effect to require the shipowner to defend the *in rem* action in this country is to thwart entirely a trial of the issues in this cause in the agreed upon forum.

Inserting the word "ship" in the jurisdictional clause, as the majority would require, would be mere surplusage when it is realized that once a party has agreed not to proceed in a forum against the ship's owner, he cannot proceed *in rem* against that owner's ship, once the vessel has posted security to protect cargo's lien. No authority has been cited by Respondent or by the majority in its

opinion, and it is submitted that none exists, that the order or nature of proof in this proceeding *in rem* will in any way differ from the *in personam* action against the vessel owner, now pending in Genoa.

The personification of the ship in American maritime lien law has no such purpose or requirement. The development of the maritime lien law in this country with its means of enforcement by an *in rem* proceeding is treated in the latest work on the Law of Admiralty,[3] in such a fashion that it leaves no room for enlargement of the personification of the ship theory to enable a cargo maritime lien holder to avoid an otherwise valid agreement. The maritime lien held by Respondent as cargo owner gives it no more right than the right to assure through the *in rem* libel the presence of security for the lien, the assurance of a fund to satisfy it. However, once secured there is nothing to support proceeding to trial separately on the *in rem* libel nor has any authority, reason or practice been advanced by the parties or cited in the majority opinion, to undermine Petitioners' contention that:

> Once a cargo maritime lienor has its *in rem* seizure of the vessel at any place where it has found the vessel and has received, either by the Marshal holding the ship or by a bond on file in substitute for the ship, full security to satisfy its claim, the trial of the issues raised by the libel, both *in rem* and *in personam*, can be held in any Court upon which the parties agreed in advance.

Petitioners' position to this effect is tempered by a requirement of a showing that the agreement was not unreason-

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[3] The Law of Admiralty, Gilmore & Black (1957 Edition—pp. 480-510).

able in a particular case in which it exists. This is the result when the nature of the *in rem* action is considered in its proper prospective as no more than a security device, which, when satisfied, by the posting of adequate security, under no rule of law or characteristic of the lien, imparts a further right to a trial in the jurisdiction where the surety bond is posted. Generally the trial may proceed in the jurisdiction where the bond is posted but, when the Lienor has agreed to sue elsewhere and such agreement has been found enforceable, no sound rule of law or of contract interpretation exists for proceeding to trial separately in the forum where the bond has been posted, in complete usurpation of the jurisdictional agreement.

Respondent in fact has but one cause of action and after it has its security its agreement to litigate the issues in a particular forum should control.

Conclusion

For the reasons set forth above, it is respectfully urged that rehearing be granted, that the judgment of the Court of Appeals below should be reversed and that of the District Court below reinstated.

Respectfully submitted,

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Houston 2, Texas

Of Counsel:

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Certificate of Counsel

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

E. D. VICKERY
Counsel for Petitioners

April 22, 1959.

APPENDIX A

DOCUMENT No. 403

Committee to Consider the Decisions of the Courts of the Second Circuit Regarding Jurisdiction and Forum

Mr. Nicholas J. Healy, III, Chairman, read the following report:

The Committee met and duly considered the decision of the United States Court of Appeals for the Second Circuit in *The Oklahoma* (*Wm. H. Muller & Co. Inc., v. Swedish American Line, Ltd.*), 224 F. 2d 806, 1955 A.M.C. 1687, cert. denied, 100 L. Ed. 103, 1955 A.M.C. 2406, and the decision of the United States District Court for the Southern District of New York in *The Bio Bio*, 127 F. Supp. 13, aff'd 227 F. 2d 519 (C.C.A. 2). Consideration was also given to *The Punta Del Este*, 135 F. Supp. 394, 1955 A.M.C. 2288, a decision of the United States District Court for the District of New Jersey.

In *The Oklahoma*, supra, Judge Conger exercised his discretion and declined to retain jurisdiction of a suit brought by a New York corporation to recover for the loss of a shipment of 1,000 bags of cocoa beans when the Oklahoma sank while en route from Gothenburg, Sweden, to United States Atlantic ports. Respondents moved for an order declining jurisdiction and dismissing the libel on the ground that the parties had agreed to jurisdiction in Swedish Court, and upon the ground of *forum non conveniens*. Respondents pleaded the bill of lading, including the jurisdictional clause, reading as follows:

> "JURISDICTION. Any claims against the carrier arising under this Bill of Lading shall be decided according to Swedish law, except as provided elsewhere

herein, and in the Swedish courts, to the jurisdiction of which the Carrier submits himself."

The District Court held that there was nothing in the Carriage of Goods by Sea Act which invalidated such a stipulation, and, since there was no showing that libelant could not obtain justice in Sweden, gave the agreement the full effect. The Court also stated:

> "Were I to reach the question of *forum non conveniens*, I would hold to the same conclusion in view of the agreement plus the fact that the Oklahoma is Swedish owned, was built in Sweden, and all the crew members reside there."

On appeal the Court of Appeals agreed that the Carriage of Goods by Sea Act, 1936, did not invalidate the jurisdictional agreement and held that the enforcement of a clause such as the one quoted would not be in contravention of public policy. The Court said "that in each case the enforceability of such an agreement depends upon its reasonableness." The Court of Appeals held that the District Court did have jurisdiction, but went on to say:

> "But if in the proper exercise of its jurisdiction, by a preliminary ruling the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented."

The Court of Appeals then considered "the setting of this case", as shown by respondents, and held:

> "On this showing, we think the judge below could rightly conclude that the jurisdictional agreement was not unreasonable and that the adherence of the parties to that agreement, which for aught that appears was freely given, should be given effect. In declining jurisdiction and dismissing the complaint we think he was well within the limits of lawful judicial discretion."

In *The Bio Bio*, the Southern District Court followed *The Oklahoma*.

In *The Punta Del Este*, the District Court for the District of New Jersey retained jurisdiction of a suit between foreigners despite an agreement as to foreign jurisdiction.

One additional case involving similar issues is pending in a District Court in the Fifth Circuit.

[4076]

It is the view of a majority of the Committee that it would be inadvisable for this Association to take any action with respect to *The Oklahoma* decision at the present time, for the following reasons:

1.) A similar case is now pending in a district court in the Fifth Circuit, and it is conceivable that that case may eventually come before the Court of Appeals and possibly before the United States Supreme Court. It is therefore conceivable that before long *The Oklahoma* case may be overruled.

2.) If legislation to counteract the effect of *The Oklahoma* were enacted, it would limit the exercise of judicial discretion to decline jurisdiction in cases where the particular Court feels that justice would best be served by declining it. This would be a very drastic limitation by

the legislature of a prerogative which traditionally has been considered that of the judiciary.

3.) Thus far, there has been no serious prejudice to American litigants as a class as a result of *The Oklahoma* decision.

4.) More time will have to elapse before the full import of *The Oklahoma* decision can be properly evaluated.

5.) The effect of *The Oklahoma* decision is not so momentous as to warrant the sponsorship, by this Association, of a bill to counteract its effect, merely because a substantial number, or perhaps even a bare majority of the members of the Association, may disagree with the United States Court of Appeals for the Second Circuit. It is felt that this Association should not sponsor Congressional legislation to counteract the effect of a particular court decision unless a substantial majority of the members feel that the decision is contrary to the objectives of the Association.

The Committee recommends that it be continued, at least until the next meeting of the Association, for the purpose of considering and reporting on any similar decisions which may be rendered, but that no further action be taken by the Association at this time.

Respectfully submitted,

NICHOLAS J. HEALY, 3RD,
Chairman
NORMAN M. BARRON
HENRY C. BLACKISTON
JOHN F. GERITY
GORDON W. PAULSEN

Mr. Henry N. Longley read the following minority report:

We dissent from the Report of the Committee to be submitted to the Association at its meeting to be held on November 9, 1956.

At the meeting of the Committee on November 1, 1956, and with particular reference to the decision of the Court of Appeals for the Second Circuit in *The Oklahoma*, 224 Fed. 2d 806, Mr. Longley moved that the Committee prepare and submit to the Association for its consideration a bill for ultimate submission to the Congress of the United States, making invalid a clause in a shipping contract requiring an American citizen suing in his own right, to pursue his rights in some foreign country, such as that of the flag of the carrying ship.

The motion was defeated. The majority of the Committee thought that no action should be taken until more and similar cases concerning the question of an American citizen's absolute right to maintain jurisdiction in American courts were decided.

We believe that the decision of the Court of Appeals for the Second Circuit in *The Oklahoma* case and the denial by the United States Supreme Court (350 U.S. 903), of the petition for a writ of certiorari are sufficient indications that the courts, finding no prohibition in the United States Carriage of Goods by Sea Act or any other Act against "jurisdiction" clauses in bills of lading, will continue to hold that a citizen of the United States is bound by such clauses to institute actions in a foreign country where there is a bill of lading clause containing that limitation of action.

We think the state of affairs which these clauses and *The Oklahoma* case has created is unfair to American citizens engaged in international commerce. Under this decision an American citizen may be deprived of redress in our courts by the simple expedient of a foreign shipowner inserting in its bill of lading a provision requiring suit in the country of the ship's flag.

The fact that the Court of Appeals for the Second Circuit based its holding on the ground that the facts of *The Oklahoma* case made the bill of lading clause "reasonable", only serves to confuse rights about which there should be no question in the minds of American businessmen.

Furthermore, the duty under the clauses in question to sue in a foreign country practically eliminates any right of action which a cargo owner may have where the amount of the loss does not justify referral of the case to a foreign country. Moreover, where the ship flies the

flag of a foreign country which has a system of law quite different from our own—such as, Japan, for instance—the decision in effect destroys the rights of an American citizen.

This windfall to foreign ship owners, we believe, will not be condoned by Congress which sought through "the Carriage of Goods by Sea Act" to remove long standing inequities against cargo owners resulting from other unilateral clauses in ocean bills of lading.

Respectfully,

HENRY N. LONGLEY
GEORGE B. WARBURTON

Mr. Longley argued that bill of lading clauses which take from American citizens the right to appeal to American courts destroy the rights of American citizens whose cargo is carried on foreign flag ships. He urged the adoption of the Minority Report.

Mr. Healy moved the adoption of the Majority Report and the motion was duly seconded.

Mr. William G. Symmers spoke in opposition to the motion. He pointed out that under the law of other countries liability can be limited to less than the United States limitation of $500 per package and that in South American countries and Japan liability can be limited to zero. Thus such clauses give an advantage to foreign shipowners in competition with American shipowners.

Mr. Knauth urged that legislation be proposed which would assure the protection of United States courts to foreign corporations owned and controlled by United States citizens. The President ruled that Mr. Knauth's remarks were not germane to the present motion, though they would be pertinent to a motion to approve the Minority Report.

Mr. MacDonald Deming spoke in support of the motion. He pointed out that the decision in *The Oklahoma* was not a holding that the clause was valid under all circumstances and that it would have to be determined whether or not enforcement of the clause was reasonable under the facts of each case. The effect of *The Oklahoma* was in his opinion only to shift the burden of proof of *forum non conveniens*. He therefore urged that no action be taken until a body of judicial opinion develops.

Mr. Edward B. Hayes of Chicago spoke in opposition to the motion. He expressed the opinion that the doctrine of *The Oklahoma* would be discouraging to a young port such as Chicago.

Mr. Cyril F. Powers suggested that, if something were going to be done, action should be taken to control the increasing tendency of foreign underwriters to bring their claims to the United States to collect under circumstances where they cannot collect under their own laws.

The President summarized the question before the house as being whether to go along with the majority, which would do nothing for the present, or to go along with the minority, which would do something but would take into account various suggestions, such as that made by Mr. Powers. Mr. Longley agreed with this summary.

Mr. Joseph T. McGowan spoke in opposition to the motion. He mentioned a case of his pending in Texas, in which the Court has a motion to decline jurisdiction under advisement and may not decide the motion until after expiration of the time to sue. If he should lose the motion, it might be too late to sue abroad. He therefore urged adoption of the Minority Report.

Mr. David P. Dawson spoke in support of the motion. He suggested the following considerations: (1) that our courts could be relied upon not to decline jurisdiction in such a way as to cause any real injustice, (2) that shippers can protect themselves by shipping only on American ships and that shippers can get protection through the conferences, and (3) that we should carefully consider

the possibility of retaliatory action by foreign countries. He therefore urged adoption of the Majority Report.

Mr. Henry C. Blackiston pointed out that many who had spoken to the motion were pleading special interests which they happened to represent and that the vote would probably be along similar lines. He suggested that it would be inappropriate for the Association, representing such diverse interests, to take a position on this subject but that the special interests involved should act through their respective trade organizations.

Mr. Longley summarized the discussion in opposition to the motion, emphasizing that *The Oklahoma* is against American interests. Mr. Heady summarized in support of the motion, emphasizing that it would be a dangerous

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precedent for the Association to take a stand supported by only some, or possibly a bare majority, of the membership.

The question was put and, on a show of hands, the motion was lost by a vote of 30 in favor and 39 opposed.

Mr. Longley moved the adoption of the Minority Report and the motion was duly seconded.

The question was put and, on a show of hands, the motion was carried by a vote of 37 in favor and 33 opposed.

Mr. Herbert M. Lord suggested that any representation made to any official body be accompanied by an indication of the closeness of the vote.

Mr. Deming, seconded by Mr. Knauth, moved for reconsideration on the basis that the Majority and Minority Reports should be put before the entire membership before

a decision was made. The motion was ruled to be out of order, since Mr. Deming had voted against the Minority Report.

Mr. Norman M. Barron moved that any bill prepared for submission to the Association be circulated to the entire membership before any action is taken thereon. The motion was duly seconded and unanimously carried.

Mr. Philip K. Verleger suggested that a new committee be appointed to draft the proposed legislation and that the majority of such a committee should not be opposed to the principle of the legislation.

The President stated that he would at least enlarge the present committee.

APPENDIX B

[4173]

DOCUMENT No. 409.

THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

Report of the Committee to Consider Decisions of the Courts of the Second Circuit Regarding Jurisdiction and Forum

At the meeting of the Association, held November 9, 1956, a majority of the former committee submitted a report discussing the decisions of the U.S. Court of Appeals for the Second Circuit in *The Oklahoma*, 224 F. (2) 806; 1955 A. M. C. 1687; of the Southern District of New York in *The Bio Bio*, 127 F. Supp. 17, affirmed 227 F. (2d) 519. (C.A. 2) and of the District of New Jersey in *The Punta del Este*, 135 F. Supp. 394. It was held in the first two cases cited that United States courts should refuse to take jurisdiction of suits filed by United States citizens as cargo owners against foreign vessel owners if the bill of lading contracts contain provisions requiring that suits based on breach of their terms, be filed in the courts of the country of the ships' flags.

The report of the majority of the former committee recommended that no action be taken by the Association in relation to remedial legislation. A minority report was filed which pointed out that the decisions made it clear that without a prohibition in the United States Carriage of Goods by Sea Act or some other act against "jurisdictional" clauses in bills of lading, courts would continue to hold that a citizen of the United States having claims against a foreign vessel owner for damage to cargo, may

not look to the courts of his own country for justice, but is bound to institute any suit in a foreign country where there is a bill of lading provision limiting suit to the country of the ship's flag. It was recommended that a bill be introduced to amend the Carriage of Goods by Sea Act in this regard.

A motion to adopt the majority report having been lost, the Association adopted the minority report and directed that any proposed legislation which the Committee might advance for the approval of the Association, be circulated among the entire membership of the Association before any action should be taken on the Committee's recommendation.

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It having been suggested at the meeting of the Association that a new committee be appointed to draft the proposed legislation with a majority not opposed to the principle of remedial legislation, the president re-appointed the former committee with the addition of three new members.

Those members of the present committee who sign this report recommend to the Association that a bill be introduced in Congress amending the Carriage of Goods by Sea Act and that the Association actively work for adoption by Congress of this amendment. The amendment proposed by the Committee is to add the following language after Sec. 9:

> Any clause, covenant or agreement in a contract subject to this Act requiring the prosecution of claims in the courts of a foreign country shall be null and void and of no effect. A citizen of the United States of America suing in his or its own right to recover damages from a carrier for breach of such a contract

. shall not be barred from prosecuting his or its suit in the courts of the United States of America.

The purpose of the proposed amendment is, we think, clear. Prior to the decision in *The Oklahoma* (supra) it had long been the established law that a contractual provision seeking to oust a United States court of jurisdiction was void. The result of the decisions in *The Oklahoma*, *The Bio Bio*, and in the most recent case of *The Monrosa*, decided in the Eastern District of Texas (not reported), inhibiting a United States citizen from pursuing his rights against a foreign vessel owner in a United States court is, we think, so strange and inequitable as to require legislative action. The adoption by the Association, at the meeting of November 9, 1956, of the minority report of the former committee, makes it apparent that the Association as a whole agreed that legislation is called for.

Respectfully submitted,

RUSSEL A. MACKEY;
RUSSEL T. MOUNT;
WILLIAM G. SYMMERS;
GEORGE B. WARBURTON;
HENRY N. LONGLEY, Chairman

October 29, 1957.

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The undersigned members of the present Committee remain opposed to the introduction of the proposed bill, for the reasons stated in the report submitted at the 1956 Fall Meeting by a majority of the Committee as it was then constituted. That report, which failed of adoption by a vote of 39 to 30 of the members of the Association present

and voting, appears at pp. 4074-6 of M. L. A. Document No. 403 (Minutes of the 1956 Fall Meeting).

It is still felt there has been no serious prejudice to American litigants as a class as a result of *The Oklahoma* decision, and that this Association should not sponsor legislation to counteract the effect of isolated court decisions unless a substantial majority of the members believe that the decisions are contrary to the objectives of the Association.

In any event, if the Association is going to sponsor a bill to amend the Carriage of Goods Act, the undersigned members of the Committee feel that the bill should not be limited to the proposed addition of Section 9a, but should be enlarged so as to cover other amendments as well. For example, many members of the Association would probably be in favor of an amendment which would nullify the effect of the "both-to-blame" decision *(The Esso Belgium*, 343 U.S. 236, 1952 A.M.C. 659).

Respectfully submitted,

NORMAN M. BARRON,
HENRY C. BLACKISTON,
JOHN F. GERITY,
NICHOLAS J. HEALY, 3RD,
GORDON W. PAULSEN.

APPENDIX C

[4226]

DOCUMENT No. 414

Committee to Consider the Decision of the Courts Regarding Jurisdiction and Forum:

Mr. Henry N. Longley, Chairman of the Committee, referred to the Committee's report, which had been circulated as Association Document No. 409, consisting of two dissenting reports each signed by five members of the Committee, hereinafter for convenience referred to as the "Majority Report" and the "Minority Report" respectively.

Mr. Longley moved the adoption of the "Majority Report" and spoke in support thereof. He argued that, under recent decision, United States citizens are deprived of the right of choosing the forum in which to sue and that those who signed the "Minority Report" represented the interests of foreign shipowners.

Mr. Nicholas J. Healy, III, spoke in support of the "Minority Report". He argued that no court had abused its discretion in this regard in the past year. He also pointed out that the Association is deeply divided on this question, the "Majority Report" being in the interest of only one segment of the membership, and argued that the Association should not take a stand on a question as to which it is so divided.

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Mr. Longley's motion was duly seconded.

Mr. James M. Estabrook spoke in support of the "Minority Report" on the ground that the "Majority Report" does not subtantially represent the great majority

of the Association and is therefore not a persuasive authority on which to go to Congress.

Mr. Charles S. Haight also spoke in support of the "Minority Report". He argued that the courts should not be deprived of their discretion to remit cases to foreign courts because in cases where many witnesses would have to be brought from abroad at great expense to require a trial in the United States would be an injustice. He also pointed out that the *Oklahoma* decision, while it reflected and talked of the Bill of Lading clause, relied on the discretion of the admiralty courts in declining to retain jurisdiction.

Mr. Haight also pointed out that a move to change the Carriage of Goods by Sea Act in one respect would raise the question of amending it in other respects.

Mr. George B. Warburton, speaking in support of the "Majority Report", argued that cargo interests had been prejudiced during the period since the *Oklahoma* decision and that the Association should delay no longer in the matter.

Mr. Norman M. Barron spoke in support of the "Minority Report", arguing that the supporters of the "Majority Report" had not made a showing of actual prejudice to the interests of United States citizens.

Mr. Warburton mentioned that in the *Oklahoma* litigation in Sweden, the cargo interests were ordered by the court to post a bond for $25,000 and encountered technical difficulties which they would not have met in a United States court.

Mr. John F. Gerity argued that the "Minority Report" is out of order in view of the vote of the Association on this subject at the 1956 Fall Meeting.

Mr. Michael F. Whelan spoke in opposition to the "Majority Report". Mr. Whelan argued that the proposed amendment to the Carriage of Goods by Sea Act was so worded that it would give rise to a number of disputes as to its meaning.

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Mr. William H. Maness, in opposition to the "Majority Report", argued that it proposed class legislation and would tend to destroy international uniformity of law. He also argued that the wording of the proposed amendment was not clear.

Mr. Philip K. Verleger suggested that the law should be clarified to define narrowly and clearly which cases should and which should not be remitted to foreign jurisdictions to avoid having two suits pending in different jurisdictions while awaiting a decision in the preferred jurisdiction.

The question was put and the vote was 46 "yes" and 78 "no", the motion being lost.

Mr. Martin P. Detels, Chairman of the Committee, reported with reference to the *Wilburn Boat Co.* case that it was an action begun in the State Court and removed to the Federal Court in Texas, where the trial court decided in favor of the underwriters who were sued on a marine policy which covered the boat against fire. The decision of the District Court was affirmed by the Court of Appeals, on the basis of the maritime law. Then the case was taken to the Supreme Court which held that it should be decided according to State law. It went back to the District Court which, on the same evidence as before, then found in favor of the insured on all points, on the basis of the Texas State law. It is now again on appeal to the Court of Appeals.